

Organizing the Unorganized: Unionization in the Chartered Banks of Canada

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Citation Information

Lennon, Elizabeth J. Shilton. "Organizing the Unorganized: Unionization in the Chartered Banks of Canada." *Osgoode Hall Law Journal* 18.2 (1980) : 177-237.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol18/iss2/1>

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OSGOODE HALL LAW JOURNAL

Vol. 18

No. 2

August 1980

ORGANIZING THE UNORGANIZED: UNIONIZATION IN THE CHARTERED BANKS OF CANADA

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I. INTRODUCTION

Since the introduction of trade union legislation in the 1940's, union membership in Canada has increased from about twenty percent of the non-agricultural work force in 1942 to a high of about forty percent today.¹ An even larger percentage of Canadian workers is governed by collective agreements: perhaps as many as sixty percent work under "union" conditions.² When these figures are compared with those from the United States, where similar unions operating under similar economic conditions have attracted only about thirty percent of the work force into membership,³ it is not immediately obvious that there is a crisis in union growth in Canada, or that any major changes in legislative policy towards unionism are necessary.

On deeper analysis, however, Canadian growth patterns give cause for concern. Although the percentage of union membership doubled between 1942 and 1978, it was almost as high in 1958 as it is today.⁴ Furthermore, although there have been significant increases in union membership over the last ten years, a large proportion of this increase is attributable to public sector employees who entered the union fold because of changes in legislative policy.⁵ The public sector has its own history and often its own legislative regime,⁶ and the fact that public employees are now unionized in large numbers is no cause for optimism about the health of the system in general. Finally, union membership is very unevenly distributed throughout the economy: while almost three-quarters of construction workers, for example, are unionized, the figure for workers in finance, insurance and real estate is only 1.4 percent.⁷

¹ *Labour Organizations in Canada, 1976-1977* (Ottawa, Dept. of Lab., 1977) Table 1, and *Labour Organizations in Canada, 1978* (Ottawa, Dept. of Lab., 1978) Table 1. The actual figures are 20.6% in 1942 and 39% in 1978.

² *The Current Industrial Relations Scene in Canada, 1978*, ed. Wood and Kumar, (Kingston, Industrial Relations Centre, 1978) at 157. The figure for 1976 was 58%.

³ *Id.* at 260. The actual figure is 28.3% of the non-agricultural workforce, down from 29.1% in 1974. U.S. unions also showed an absolute decline in membership between 1974 and 1976 of 346,000.

⁴ *Labour Organizations in Canada, 1976-1977*, *supra* note 1, at Table 1. In 1958 34.2% of the workforce was unionized. This figure declined to a low of 29.4% in 1964 and did not reach 34% again until 1972 (34.6%).

⁵ See Bain, *Union Growth and Public Policy in Canada* (Ottawa, Lab. Can. 1978) at 12. See also *The Current Industrial Relations Scene in Canada, 1978*, *supra* note 2, at 257.

⁶ Many public employee statutes, especially those dealing with teachers, provide for compulsory union membership: see for example *Teachers' Collective Bargaining Act*, S.N.S. 1974, c. 32 and *The School Boards and Teachers' Collective Negotiations Act*, S.O. 1975, c. 72. Under other public employee collective bargaining regimes which employ more traditional certification procedures, there was a long history of membership, often compulsory, in staff associations and the transition to unionization was not difficult. The increase in unionization in the public sector is of enormous significance but it is not indicative of a general trend to unionization among Canadian white collar workers, nor is it evidence that the Canadian system works in attracting unorganized workers to collective bargaining.

⁷ See Bain, *supra* note 5, at 10, Table IV. These and other reasons for pessimism about current trends are identified by Bain, *op. cit.*

Service sectors of the economy like finance, insurance and retail trade give particular cause for concern. They are very lightly unionized in absolute terms and have shown themselves to be highly resistant to unionization over the years.⁸ Furthermore, these sectors are growing in relation to the economy as a whole at the expense of more densely unionized sectors like construction and manufacturing.⁹ Therefore, if they continue to show relatively low rates of unionization, the total percentage of Canadian workers unionized cannot fail to decline.

One obvious answer to the dilemma posed by the statistics is to "organize the unorganized." This, however, is not a simple matter. Organized labour, so often stigmatized as "dues-hungry," would not ignore such a large sector unless there were very real obstacles in the path of organizing these sectors of the economy. These obstacles must be identified and removed before the organizing task can be successful.

This paper is a case study in organizing a segment of a hard-core unorganized sector: the chartered banks of Canada. Serious organizing efforts have been underway in the banks for approximately three years;¹⁰ it should be possible to assess the campaign and extract, albeit tentatively, some general conclusions from it. Particular attention will be paid to an evaluation of the extent to which the law plays a role in promoting or retarding organization among the unorganized. This paper will also suggest ways in which the law could operate more effectively.

II. BACKGROUND

A. *Banking Structure*

There are currently ten chartered banks in Canada, functioning through a very widespread network of small branches.¹¹ While some of these banks are localized, and several are small, the "Big Five," which control ninety-one percent of total bank assets, operate throughout Canada.¹² Organization is highly centralized, with most important decisions emanating from the head offices in either Toronto or Montreal. Most have provincial or regional administrative subdivisions as well.

⁸ Bain's figures show increases in union density in these sectors from 1961 to 1975: the density in finance, insurance and real estate, for example, increased from .2% to 1.4%, and in trade from 5.3% to 9.3% (*supra* note 5, Table IV). These increases are not insignificant but they do not represent a breakthrough. Union density in finance, for example, compares unfavourably with agriculture (5.3%) which in most jurisdictions is excluded from the coverage of labour legislation.

⁹ Bain, *supra* note 5, at 13 n. 24.

¹⁰ SORWUC began organizing in mid-1976 and made its first application for certification on August 16, 1976. CUBE had applied for certification for its first branches a few days earlier, on August 6, 1976. Many observers feel, however, that "serious" organizing did not begin until the June 10, 1977 decision recognizing the branch as an appropriate unit.

¹¹ At the time of the initial certification, there were over 7,500 branches among eleven chartered banks.

¹² They are the Canadian Imperial Bank of Commerce, Royal Bank of Canada, Bank of Montreal, Bank of Nova Scotia, and Toronto-Dominion Bank.

Banking is a highly regulated industry. Chartered banks are required by law to exchange cheques and balance other inter-bank transactions daily, and to maintain a certain level of reserves in the Bank of Canada to back their deposits.¹³ This legal framework involves close and sensitive monitoring on a daily basis of the entire national picture, and largely accounts for the remarkably high degree of centralized decision-making and national uniformity of conditions and methods of operation that characterize the industry.

Bank employment patterns are changing slowly in response to changing social and economic conditions, but in general they still reflect the policies of an earlier era. Banks employ a remarkably high percentage of women in comparison with the Canadian labour force as a whole: in 1975 the figure was seventy-two percent.¹⁴ These women are heavily concentrated in low-paying, routine clerical jobs. The Bank of Nova Scotia indicates that while between eighty and ninety percent of its management employees are male, ninety percent of its clerical employees are female.¹⁵ This profile is typical of the industry as a whole. Comparative male/female salary levels reflect this difference in functions.

Working conditions in the banks are fairly typical of "white-collar" employment. There has been in the past a high measure of job security; whether increasing automation of clerical functions will change this is not yet apparent. There is a high turnover rate, which the banks estimate variously at between twenty-seven and thirty-six percent.¹⁶ Since turnover is confined largely to clerical (and therefore female) ranks, the figure for this class of employee would be even higher. Compensation levels for clerical employees are somewhat lower than the average for clerical work across all industries in Canada,¹⁷ and this is probably true for management employees as well.

¹³ They are subject to the *Bank Act*, R.S.C. 1970, c. B-1 and the *Bills of Exchange Act*, R.S.C. 1970, c. B-5.

¹⁴ Data on bank employment practices is taken largely from Bossen, *Manpower Utilization in Canadian Chartered Banks* (Royal Commission on the Status of Women, Study No. 4, 1971) and Bossen, *Employment in Chartered Banks, 1969-1975* (Ottawa, n. p., 1976).

¹⁵ *Bank of Nova Scotia, Port Dover, Simcoe and Jarvis Branches* (1977) 21 di 439 at 453, 77 C.L.L.C. ¶16,090 at 534. The case also appears at [1977] 2 Can. L.R.B.R. 126 but the portion referred to is not included in the judgment. [Hereinafter *Port Dover*.]

¹⁶ The Royal estimates turnover at 33-36%: see *Transcript of Proceedings, SORWUC and Royal Bank, Gibsons Branch*, Board File: 555-783, testimony of Gordon Yule at 129. The Commerce estimates its turnover rate at 27%, its female turnover rate at 31% and its male at 15%: see *Transcript of Proceedings, SORWUC and the Canadian Imperial Bank of Commerce, Victory Square Branch*, Board File: 555-614, testimony of Philip Cotton at 249. The Bank of Nova Scotia's figures are 35% clerical turnover and 16% management turnover: see *Port Dover*, *supra* note 15.

¹⁷ A study for the chartered banks estimated that bank salaries for female clerical employees are approximately 4% below those in all industries generally in Canada, and approximately 12% below salaries for unionized female clerical employees in all industries. Burns-Fry Ltd., *Investment Notes: Labour Unions and the Chartered Banks* (n. p., 1978) at 7. [Hereinafter *Burns-Fry Study*.]

B. History of Bank Organizing

The chartered banks have been notoriously resistant to trade unionism, and there have been only sporadic attempts to organize them over the years. It was not until 1959 that the Canada Labour Relations Board received its first application for certification from a union seeking to represent bank employees. The Kitimat, Terrace and District General Workers' Union, Local 1583 applied for a unit of three workers among a total staff of five in the Kitimat branch of the Bank of Nova Scotia.¹⁸ The bank contested the application on the grounds that the unit was not appropriate for collective bargaining, taking the position that only a national unit would be appropriate. Although the application was dismissed on the basis that the unit was not appropriate, the Board was careful to point out that it was not accepting the argument that only a national unit would be suitable: "It may well be that units of some of the employees of a Bank, grouped together territorially or on some other basis, will prove to be appropriate, rather than a nation-wide unit."¹⁹ It was clear, however, that a branch was *not* an appropriate unit.

This decision understandably daunted the trade union movement. In 1959 the Royal Bank had 503 branches nationally and presented a truly formidable organizing task. The task became even more formidable as branches proliferated with the passage of time. Although the *Kitimat* decision hinted at some more manageable unit, none was readily apparent since the administration of bank personnel was, in fact, largely handled at the national level, as the bank had argued. The response of the trade union movement to the *Kitimat* decision was virtually to suspend organizing for about fifteen years.²⁰

Outside of the chartered banks, some progress was being made in the financial sector. In 1967 the Office and Professional Employees International Union (OPEIU) was certified to represent all the employees of the Montreal and District Savings Bank.²¹ This bank had seventy-five branches at the time, all in the Montreal area, and presented a manageable organizing task.²² The 1979 round of negotiations saw the first strike, which lasted only two days. The majority of the nationally chartered banks, however, pose labour relations problems of a different magnitude, as both the labour movement and the banks recognized.

In 1972 the Canadian Labour Congress (CLC), recognizing the serious threat to the labour movement posed by an unorganized and expanding

¹⁸ *Bank of Nova Scotia, Kitimat* (1959), 59 C.L.L.C. ¶18,152. [Hereinafter *Kitimat*.]

¹⁹ *Id.* at 1799.

²⁰ An application for a unit of IBM operators in the Banque Canadienne Nationale is the only exception. See *La Banque Canadienne Nationale* (1967), 67 C.L.L.C. ¶16,010. (Can. L.R.B.)

²¹ For historical reasons this institution is not chartered under the *Bank Act*; it operates under its own federal statute, the *Quebec Savings Bank Act*, R.S.C. 1970, c. B-4.

²² Montreal City and District Savings Bank is exceptional for another reason as well; it had a functioning staff association since 1920. See "Montreal City and District Savings Bank Breaks Strike Ground", *Canada Labour Views Report*, February 19, 1979.

"white-collar" work force, launched a widely publicized campaign to organize the financial sector. It chartered a series of locals under the umbrella of the Association of Commercial and Technical Employees (ACTE) to carry the Congress banner, and instituted a two cent per capita per month levy to fund the drive. After making some sporadic forays into insurance companies and related institutions, the ACTE campaign broke, largely on the twin rocks of inter-union jurisdictional squabbles and bureaucratic myopia. ACTE organizers complained that, despite the large "war chest," ACTE was kept short-staffed and starved for funds, and ceased organizing long before its projected five year life-span was up.²³ It had a negligible impact on the low union density statistics for the financial sector.

Aside from a sprinkling of provincial certifications held by various unions in trust companies and credit unions, the financial sector in 1976 was still virgin territory for the labour movement. The chartered banks presented a challenge that no Congress affiliate was prepared to confront in any effective way.

C. *SORWUC and CUBE*

If unions did not appear to be very interested in bank workers, at least some bank workers were interested in unions. This interest crystallized independently in two parts of the country: Ontario and British Columbia. In mid-1976 the first applications for branch certification since *Kitimat* were filed.

When clerical women in the Bank of Nova Scotia and the Canadian Imperial Bank of Commerce in Simcoe, Port Dover and Jarvis, Ontario were ready for union representation, they turned, not to a CLC affiliate with established jurisdiction in the field of clerical employment, but to the fledgling Canadian Chemical Workers' Union (CCWU), recently formed by the breakaway Canadian membership of the International Chemical Workers' Union. The reasons for their choice were somewhat arbitrary. The union was in the news at the time because of the publicity surrounding its recent break-away.²⁴ Perhaps more significant, the husband of one of the bank workers was a CCWU steward.²⁵ Certainly the CCWU had no mission to organize bank workers, or any particular commitment to organizing women. Nevertheless, it agreed to supervise these particular applications for certification, while intending, from the first, to turn the units over to some more appropriate union if they were certified. Meanwhile, separate applications for certification were filed with the Canada Labour Relations Board (CLRB) by locals of the CCWU for three branches of the Bank of Nova Scotia and one branch of the Commerce. Only when it became apparent that the CCWU might be con-

²³ See "Decade of Good Relations for Union, Bank", *The Globe and Mail*, September 4, 1978 at 11. ACTE is still alive and holds a few certificates across the country. An ACTE local made an unsuccessful application for certification for a Sudbury, Ontario branch of the Bank of Montreal.

²⁴ "History Made as First Bank Contract Ratified", *Ontario Labour*, Nov./Dec. 1978 at 9.

²⁵ See Lowe, *The Canadian Union of Bank Employees* (Toronto, n.p., 1978) at 12.

stitutionally incapable of representing bank employees was the Canadian Union of Bank Employees (CUBE) formed.²⁶ Applications were refiled in the name of the new union, and these applications were finally heard by the CLRB in May of 1977.

The history of the Service, Office and Retail Workers' Union of Canada (SORWUC) and its contact with bank workers is quite different.²⁷ This union was an outgrowth of the Vancouver women's liberation movement, and was founded in 1972 by the Working Women's Association (WWA), a feminist labour support group. Although WWA members were working women, in general they worked in unorganized workplaces. Their contacts with the trade union movement had been uniformly negative. One member, who worked as a typist in an insurance company at the time, reports contacting the Office and Technical Employees' Union, the west coast local of OPEIU, for assistance in organizing her office. She was told that all employees in insurance companies had access to confidential information and therefore were ineligible to unionize. Another who worked in a chain restaurant was able to persuade an established union to accept an already signed-up unit for the purpose of an application for certification, but the union backed off when management fired the organizers. The waitresses had to turn to the WWA for help. These and similar experiences convinced them that traditional unions were both uninterested in organizing women workers and insensitive to women's problems in the workplace. They felt that there was a pressing need for a union organized and controlled by women and committed to organizing places where women worked.

The SORWUC approach represented a marked departure from traditional union jurisdictional behaviour. The union sought certifications wherever women worked: in restaurants, offices (including a law office), credit unions, day care centres, social service agencies, a community radio station and a university student union. In 1976, prior to its bank organizing efforts, it held twelve certifications, all in the Vancouver area, and had approximately 150 active members. It depended then, as now, largely on volunteer labour and contributions from sympathizers in the trade union movement to fund and administer its organizing efforts.

Although bank workers are mainly women and, thus, are part of SORWUC's natural jurisdiction, the union did not move into the banking field immediately. However, in the spring of 1976 it campaigned with leaflets in Vancouver's downtown area, inviting contact from clerical women interested in organizing. There was a strong response from bank workers and the union decided to follow up on these contacts made in the various branches.

SORWUC and its legal advisors were not at all confident that the CLRB would accept an individual bank branch as a unit appropriate for collective

²⁶ *Id.* at 14.

²⁷ Information on SORWUC is gathered from Bank Book Collective *An Account to Settle: The Story of the United Bank Workers (SORWUC)* (Vancouver: Press Gang Pub., 1979), and from personal interviews with Jean Rands and Jackie Ainsworth, long-time SORWUC members and officers.

bargaining, although that was always a possibility. The main purpose in applying for a number of branch units was something rather different. First of all, SORWUC felt that a strong argument could be made that the CLRB, even if it refused to certify a branch unit, was obliged to respond to an application for certification by defining the unit that *was* appropriate for collective bargaining.²⁸ A branch application was a way of stating a case to the Board on the question left open in *Kitimat*. If that question were answered definitively, future organizing, on whatever basis, would not have to take place in a legal vacuum, and bank workers would at least know that it was legal for them to unionize—a question on which there appears to have been some doubt even in the minds of union officials.²⁹ SORWUC's guess was that the Board would declare the region to be the appropriate unit. Secondly, the union felt that putting a large number of branch applications before the Board would have a tactical significance in demonstrating to the Board that the sentiment for unionization in the banks was not just an isolated phenomenon, thereby placing pressure on it to make a decision that would give that sentiment some scope to develop. It would also build momentum for the all-province organizing drive that the union anticipated would be desirable, if not necessary, after the Board's decision.

The strategy was, then, to assemble as many applications for certification as possible and to file them in rapid succession. The first was an application for employees at the Victory Square branch of the Canadian Imperial Bank of Commerce in Vancouver, filed on August 16, 1976. Sixteen more branches of various banks applied before the end of 1976. Momentum dropped somewhat after that, but SORWUC had filed a total of twenty-two applications for certification before the first hearings were held in April of 1977.

A special bank workers' local, Local 2, was formed in September of 1976 and became known as the United Bank Workers. Even after the formation of Local 2, however, certification applications continued to be made in the name of the national body, SORWUC, and the name "United Bank Workers" does not figure prominently in this history.

D. *Impetus to Organize*

The question of why groups of bank workers on opposite sides of the country decided independently to file applications for certification at the same time is not easy to answer. The campaign was certainly not sparked by any new factor introduced into the nation-wide system. Predictably, however, there were common grievances, some of which were aggravated by factors peculiar to the historical moment at which the applications were filed.

The major grievance identified by both the Ontario and British Columbia groups was low wages.³⁰ An independent study financed by the banks found

²⁸ *Canada Labour Code*, R.S.C. 1970, c. L-1 as am. by S.C. 1972, c. 18, s. 125(1).

²⁹ An organizer for OTEU, a local of OPEIU, was reported to have said after the SORWUC applications were filed that it was contrary to the *Bank Act* for bank workers to unionize. See *An Account to Settle*, *supra* note 27 at 24.

³⁰ See e.g., Lowe, *supra* note 25, and *An Account to Settle*, *supra* note 27.

that bank clerical wages were about four percent below the national average for female clerical employees.³¹ Bank clerks were aware of this disparity, but such fairly marginal differences were not the focus of their complaints. At least, as perceived by SORWUC and its members, the issue of wages in the banks was only one aspect of the much broader issue of women's wages in Canadian society. The fact that the wage rates in the banks were "competitive" was completely irrelevant to women organized around this issue. Their ultimate goal was not parity with other female clerks, or even unionized female clerks; it was the much more revolutionary goal of parity with male workers. Viewed from this perspective, the enormous wage increase demanded by SORWUC in its first contract—an increase in the base rate from \$600 to \$1,140 per month—was not "capricious,"³² although it may well have been outside the realm of rational expectation.

The wage problem was exacerbated at the time of the unionization drive by the federal wage control guidelines. Salary ceilings increased the frustrations of low wage earners everywhere in Canada in a time of galloping inflation, but bank clerks' frustrations were increased even more by their conviction that the banks were simply using the guidelines as a cover for their traditional policy of exploiting a weak and divided female work force.³³

A second significant issue was sex discrimination within the banks.³⁴ Women resented having to train young male employees who received more pay than they did even while in training. The trainees would then move on to higher positions to which their "teachers" had no access. They also resented the fact that the more desirable, more highly paid positions invariably went to men who were just "passing through" rather than to experienced and competent women who had a permanent commitment to the branch. Women did not always want access to the formal training programmes, although the systematic exclusion of women "from the ranks" from these programmes was a not inconsiderable grievance. More often, they simply objected to the fact that seniority counted for nothing in the bank promotion policies affecting clerical workers.

Discrimination against women employees has been a characteristic of banking since its birth, and women had accepted it as part of the immutable *rerum naturum*. There is no doubt that the women's movement and the concomitant increase in women's employment expectations must be largely credited with aggravating these grievances. The situation for women in banks, at least in terms of promotion opportunities, was improving, but opportunities were not expanding as rapidly as the consciousness of female employees.

The issues and the will to collective action were there, but it is no accident that the first breakthroughs in the banking industry were made by unions that were not part of the established trade union movement. It would

³¹ *Burns-Fry Study*, *supra* note 17 at 7.

³² *Id.* at 8.

³³ See Lowe, *supra* note 25, at 12-3.

³⁴ *Id.* at 10.

be a mistake to overemphasize the similarities between CUBE and SORWUC; their histories were very different, as were their reasons for operating outside the mainstream of the Canadian labour movement.³⁵ They had at least something in common: as unions functioning outside the Canadian Labour Congress, they had no jurisdictional inhibitions and no incentive to send bank workers who were ripe for unionization to established unions which might be less receptive to them. Furthermore, at least in the case of SORWUC, there were two additional ingredients: a passionate commitment to organizing the unorganized and a conviction that working women have as much right to union representation as working men. CLC unions with a claim to bank jurisdiction gave every indication of accepting the *Kitimat* decision as the death certificate for bank unionization. The only unions prepared to take the risk of another failure were those that had little to lose by it.

E. *The Victory Square Decision*

Prior to the advent of bank organizing the Canada Labour Relations Board had enjoyed a relatively tranquil existence. Operating in a narrow jurisdiction among industries with stable, long-term collective bargaining relationships, it was unused to controversy. It recognized the SORWUC and CUBE applications for the political time bombs that they were. Hesitant to commit itself in an area that would clearly have far reaching implications, the Board followed the course of simply delaying the scheduling of these cases. Admittedly there was little pressure, at least in the initial months, from either side. The banks were happy if the matter were never heard. Delay also served the SORWUC strategy of accumulating applications before the hearings.

To do the Board justice, it had no reason to believe at the time that delay would have much effect on the success or failure of the applications. The union had majority membership in most of the units for which it had applied, and, under the prevailing Board jurisprudence, this would have been sufficient to ensure certification regardless of when the matter was heard. The intervention of a Federal Court decision changing this rule could not have been foreseen.³⁶ Nevertheless, delay, among other evils, could have been expected to undermine union support at the bargaining table. The time lag of more than eight months between the initial application and the first hearing was scarcely an auspicious beginning to what has proved to be a troubled relationship between the CLRB, the banks and the bank unions.

The delay might have been even longer without the intervention of the Federal Court decision; the CLRB, galvanized into action, in April, 1977 heard SORWUC's applications for units in the Bank of Commerce. In May,

³⁵ The Canadian Chemical Workers Union, the CUBE parent, split from the International Chemical Workers Union over the issue of merger with the Oil, Chemical and Atomic Workers. It could not join the CLC because of the ban on dual unions. It merged with the Teamsters, also a non-CLC union, in January of 1979.

³⁶ *CKOY Ltd. v. Ottawa Newspaper Guild*, Loc. 205, [1977] 2 F.C. 412, 74 D.L.R. (3d) 229, 77 C.L.L.C. 14,093 (C.A.). [Hereinafter *CKOY*.]

CUBE's applications were heard. Finally, in twin decisions dated June 10, 1977,³⁷ the CLRB declared that a single branch of a chartered bank was a unit appropriate for collective bargaining.

In the wake of these decisions, the banks became enormously concerned about the implications of collective bargaining. Confronted with headlines like "Canada faces a vast, new wave of unionism,"³⁸ the Canadian Bankers' Association retained a firm of economic consultants³⁹ to study the effects of unionism on banks. Programmes were implemented or accelerated to hear employee grievances⁴⁰ and to update benefit packages, wage levels were increased, and annual reports hastened to reassure shareholders.⁴¹

The anticipated organizing explosion has not yet materialized, however. To date, after almost three years of organizing, only slightly over 100 of over 7,500 branches have been organized, and more than twenty-five percent of these are no longer certified. The reasons for this dismal success rate are many and complicated. A hypothesis worth exploring is that at least some of the responsibility lies with Canadian labour laws and the CLRB for failing to meet the challenge posed by hard-core unorganized sectors. To test this hypothesis, it is helpful to take a detailed look at the legal response to problems raised by bank labour relations.

III. THE UNIONS VERSUS THE BANKS: THE LAW IN OPERATION

A. *The Appropriate Unit*

The Board's decision in *Victory Square*⁴² to allow unions to organize banks on a branch-by-branch basis represents a very precarious resolution of some profound conflicts in public policy. The *Canada Labour Code* directs that "where a trade union applies . . . for certification as the bargaining agent for a unit that the trade union considers appropriate for collective bargaining, the Board shall determine the unit that, in the opinion of the Board, is appropriate for collective bargaining."⁴³ Generally speaking, there had been a shift in public policy in Canada over the preceeding few years in favour of large bargaining units. The competing considerations are stated succinctly by the British Columbia Labour Relations Board in *Insurance Corporation of British Columbia*:

[T]here is a tension between the two uses of the bargaining unit. On the one hand, the scope of the unit is the key to securing trade union representation and collec-

³⁷ *Canadian Imperial Bank of Commerce* (1977), 20 di 319, [1977] 2 Can. L.R.B.R. 99, 77 C.L.L.C. ¶16,089 [Hereinafter *Victory Square*], and *Port Dover*, *supra* note 15.

³⁸ *Vancouver Province*, June 20, 1977.

³⁹ *Burns-Fry Ltd.* *Supra* note 17.

⁴⁰ See Speirs, "Tellers Unite!", *Ottawa Citizen*, April 22, 1978; Canadian Imperial Bank of Commerce, *Annual Report*, 1977 at 18. The *Annual Report* does not discuss the motivation for improved benefits.

⁴¹ *Annual Report*, *id.*

⁴² *Supra* note 37.

⁴³ *Canada Labour Code*, R.S.C. 1970, c. L-1 as am. by S.C. 1972, c. 18, s. 125(1). [Hereinafter *Code*.]

tive bargaining rights for the employees. Since this is the fundamental purpose of the Code, the Board's definition must be such as to facilitate organization of the employees. On the other hand, that unit sets the framework for actual bargaining for a long time into the future. A structure is needed which is conducive to voluntary settlements without strikes and will minimize the disruptive effects of the latter when they do occur. Unfortunately, the lesson of experience is that these two objectives often point in different directions.⁴⁴

These words were written out of a turbulent labour relations environment which graphically demonstrated the need for comprehensive, all-employer bargaining units if possible: endless rounds of bargaining for the employer, whip-saw contracts, domino strikes and frequent raiding are only a few of the effects of fragmentation. The CLRB has been faced within the last few years with complex situations in which it opted for all-employer rather than single location bargaining units.⁴⁵

In many ways, SORWUC's application was typical. The union's choice of single branch unit was made strictly on pragmatic grounds, and the employer's choice of national unit was equally pragmatically based, but the policy trend discussed above might well have suggested that the Board would embrace the employer's position.

The bank's argument that a branch unit was not appropriate for collective bargaining was not without an objective basis.⁴⁶ The business enterprise is a highly centralized one; detailed data on every business transaction must be fed into head office on a daily basis. Uniformity in methods and procedures necessarily requires a significant degree of uniformity in personnel policies.

As the Board points out, "hiring, assessment, promotion, discipline and termination are usually *initiated* at the branch level because the bank has to rely on its managers in its many locations."⁴⁷ In fact, however, there is virtually no role for the branch to play beyond this initiatory one, since policy is invariably made and ratified at higher levels. Obviously this was a situation in which a bargaining unit coinciding with one of the employer's larger administrative units would be a more desirable one.

This was certainly the argument made by the employer. In the first branch of its argument, the bank advanced general labour relations values

⁴⁴ [1974] 1 Can. L.R.B.R. 403 at 407, 75 C.L.L.C. ¶16,146 at 1142 (B.C.L.R.B.). [Hereinafter *ICBC*.]

⁴⁵ *Atomic Energy of Canada Ltd.*, (1977), 25 di 377, [1978] 1 Can. L.R.B.R. 92, 78 C.L.L.C. ¶16,128; *B.C. Telephone Co.* (1977), 33 di 361, [1977] 2 Can. L.R.B.R. 385, 77 C.L.L.C. ¶16,107; *Saskatchewan Wheat Pool* (1977), 21 di 388, [1977] 1 Can. L.R.B.R. 510, 77 C.L.L.C. ¶16,104.

⁴⁶ The details of this discussion relate to the Commerce, but at least with respect to the Bank of Nova Scotia, counsel for the employer conceded that the fact situations were "different only in a modest degree": see *Port Dover*, *supra* note 15. On the basis of the organizational structures outlined in the reported decisions, this concession appears to be valid for all the "Big Five".

⁴⁷ *Victory Square*, *supra* note 37, at 343 (di), 117 (Can. L.R.B.R.), 518 (C.L.L.C.). [Emphasis added.]

that would be promoted by a larger unit: administrative efficiency, increased lateral mobility for employees, the desirability of common employment conditions, and a reduction in industrial unrest.⁴⁸ These considerations might be applicable to any large employer operating at a number of locations under tightly centralized control.

The second branch of the argument was more specifically tied to the nature of banking. As the argument is summarized in the Board's decision: "The role of the banking industry and its high degree of government regulation is said to be such that the industry should be viewed as a monopoly sanctioned by government with each bank as a quasi-public institution."⁴⁹ The public interest, it was argued, was very closely enmeshed with the whole question of branch unionization: "[It] would affect the property rights of all Canadians, *i.e.*, their right to deposit and withdraw money, and would disrupt the mechanism our society relies upon for the money necessary to sustain all elements of society."⁵⁰ The Board should show a special solicitude for stability in such a key sector; to allow branch certification would be to introduce "utter chaos" into the banking industry which is the "fiscal fibre" of our nation.⁵¹

It is in this second branch of its argument—this parade of what the Board characterizes as "hypothetical horrors"⁵²—that the bank reveals what could be viewed as the true basis for its objection to branch certification. If *branch* certification would introduce utter chaos into our "fiscal fibre," would not national certification bring the whole payments system to the brink of the abyss? A strike in a branch or in a few branches could be contained. Alternative methods of doing business could undoubtedly be devised. A strike on a national level, however, would inevitably bring the whole elaborate structure to a halt. To argue for a national unit in order to protect the property rights of Canadians seems totally misconceived, unless the intent is, as it surely was, to persuade the Board to agree to a unit so broad as to ensure that no union would ever be able to organize it.

The Board refused to accept the bank's position. In a diametric reversal of its earlier *Kitimat*⁵³ ruling, it found a single branch to be a unit appropriate for collective bargaining. It recognized the tensions noted in *Insurance Corp.*⁵⁴ between small units which favour the policy of fostering organization and large units which favour the policy of fostering more rational bargaining structures. However, it took its guidance from the Preamble to the *Canada*

⁴⁸ *Id.* at 346 (di), 119 (Can. L.R.B.R.), 520 (C.L.L.C.). These are the criteria suggested in *ICBC*, *supra* note 44, at 408-12 (Can. L.R.B.R.), 1142-46 (C.L.L.C.), that direct the Board towards a larger unit.

⁴⁹ *Id.* at 347 (di), 120 (Can. L.R.B.R.), 521 (C.L.L.C.).

⁵⁰ *Id.* at 347 (di), 120 (Can. L.R.B.R.), 520 (C.L.L.C.).

⁵¹ *Id.*

⁵² *Id.* at 351 (di), 123 (Can. L.R.B.R.), 523 (C.L.L.C.).

⁵³ *Supra* note 18.

⁵⁴ *Supra* note 44.

Labour Code,⁵⁵ which it read as a strong statement in favour of promoting collective bargaining:

The express intention of Parliament is the "encouragement of free collective bargaining" and to support labour and management who recognize and support collective bargaining "as the bases of effective industrial relations for the determination of good working conditions and sound labour management relations". Parliament also "deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all."⁵⁶

Fostering organization, it concluded, should be the overriding consideration where there is irreconcilable conflict between the two policies since, without organization, there can be no collective bargaining:

This legislative intent can best be achieved by facilitating collective bargaining for employees who choose this procedure for settling the terms and conditions of employment. That can be accomplished by this Board accepting or fashioning bargaining units that give employees a realistic possibility of exercising their rights under the Code. Too large units in unorganized industries will abort any possibility of collective bargaining ever commencing and defeat this express intention of Parliament.⁵⁷

This decision represents a genuine breakthrough in Canadian labour policy. It was not, of course, without its harbingers. The British Columbia Board qualified its generally pro-large unit philosophy in words prophetic of the bank situation:

Most discussions of the nature of an appropriate unit concentrate on . . . the long-term structure. However, clearly one can't have collective bargaining at all unless there is a unit in which a majority of employees will select a trade union's representative [sic]. There are certain types of employees who are traditionally difficult to organize and there are some employers who are willing to exploit that fact and stimulate opposition to a representation campaign. If, notwithstanding these obstacles, a group of employees within a viable unit wishes to have a union represent them, this Board will exercise its discretion in order to get collective bargaining under way. In that kind of situation, it makes no sense to stick rigidly to a con-

⁵⁵ The Preamble to Part V of the *Canada Labour Code*, S.C. 1972, c. 18, reads as follows:

Whereas there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;

And Whereas Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;

And Whereas the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;

And Whereas the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;

Now Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: . . .

⁵⁶ *Victory Square*, *supra* note 37, at 348 (di), 121 (Can. L.R.B.R.), 521 (C.L.L.C.).

⁵⁷ *Id.* at 348-49 (di), 121 (Can. L.R.B.R.), 521 (C.L.L.C.).

ception of the best bargaining unit in the long term, when the effect of that attitude is to abort the representation effort from the outset.⁵⁸

The Ontario Labour Relations Board scooped the CLRB by mere days in the financial sector by certifying CUBE to represent the employees of a single branch of Canada Trustco, a trust company with a number of branches throughout the province.⁵⁹

Furthermore, the criteria traditionally employed by the CLRB for unit determination allow for consideration of whether the proposed unit is too large to be realistically organized. In *Canadian Pacific Ltd.*⁶⁰ the Board discussed in detail the circumstances in which it would consent to "fragment" an all-employer unit. Citing the by-now familiar British Columbia authority, it noted that "[s]pecific industries where employees have difficulty in resorting to collective bargaining"⁶¹ warrant special treatment of this kind.

In applying this philosophy, the Board does not require that a larger unit be *impossible* to organize; a significant degree of difficulty is sufficient. This is made clear by the result, if not the language, of later decisions in which the Board was faced with the argument that a regional rather than a national unit was the appropriate one. The first of these is *Royal Bank of Canada, Gibsons Branch*.⁶² This was the first incursion by any union into the Royal Bank and the employer, following on the heels of the failure of other "Big Five" banks to convince the Board that a national unit was the only appropriate one, took the more moderate approach that a regional unit was the only appropriate one.⁶³ It was not a position of strength, since it would have been open to the Board on its own initiative in the earlier cases to opt for a regional unit if it had been so disposed. However, the Royal Bank bolstered its position with the novel argument that the Code did not allow the Board to pick and choose from among a multiplicity of possible appropriate units: it required the Board to ascertain which was *most* appropriate,⁶⁴ and to certify for that unit alone. That unit in the banking industry, it argued, was the regional unit, which met "the competing interests of bargaining unit determination, namely, long term stable labour relations and facilitating collective bargaining, and the Board's preference for larger bargaining units."⁶⁵

⁵⁸ *Supra* note 44.

⁵⁹ *Canada Trustco Mortgage Co.*, [1977] O.L.R.B. Rep. 330 at 334, [1977] 2 Can. L.R.B.R. 93 at 97.

⁶⁰ (1976), 13 di 13, [1976] 1 Can. L.R.B.R. 361, 76 C.L.L.C. ¶16,018. [Hereinafter *C.P. Ltd.*]

⁶¹ *Id.* at 31(di), 368 (Can. L.R.B.R.), 493 (C.L.L.C.).

⁶² (1977), 26 di 509, [1978] 1 Can. L.R.B.R. 326. [Hereinafter *Gibsons #1*.]

⁶³ While the rest of the "Big Five" were all represented by the same Toronto law firm, the Royal employed separate Montreal counsel. The Royal's position may have been dictated by the fact that it was differently advised rather than by the fact that the other banks had already lost the battle for the national unit.

⁶⁴ The argument in *Gibsons #1* was based primarily on the use of the definite article in s. 125(1) of the *Canada Labour Code*, *supra* note 62, at 518 (di), 332 (Can. L.R.B.R.).

⁶⁵ *Supra* note 62, at 518 (di), 332 (Can. L.R.B.R.).

The argument that the region was appropriate and the branch inappropriate was not, by this time, without some basis in bargaining history. This case was heard some months after the *Victory Square* decision.⁶⁶ In its original reply to the Gibsons application, the employer had been prepared to concede the appropriateness of the unit on the basis of the earlier decisions. It changed its position only after SORWUC made public its decision to attempt to negotiate a master contract covering all its certified branches in British Columbia.⁶⁷ The employer asked the Board to infer from SORWUC's decision that the union itself recognized the inappropriateness of the branch bargaining unit.

The Board rejected the employer's statutory argument that it was compelled to find the *most* appropriate unit. It then concluded that there was no reason to prefer the region over the branch in this case. Although the task of organizing a regional unit might be "less impossible,"⁶⁸ it was still formidable:

To require employees of this employer in two hundred and three locations to act in concert in order to exercise that freedom would not only, as a practical matter, restrict their freedom of choice of a trade union, but would also effectively negate any realistic possibility of exercising the freedom granted in section 110(1).⁶⁹

The "impossibility" criterion is watered down even further in *Banque Provinciale du Canada*,⁷⁰ where the employer advocated the appropriateness of a regional rather than a branch unit. In a bank operating only in the province of Quebec, however, the region in question consisted of only forty-two branches in a relatively confined geographic area. Nevertheless, the Board's response is the now-familiar one: to certify the branch. This decision appears to be the Board's announcement that no matter what the structure of a particular bank, a branch will be an appropriate unit because it is easier to organize.

The branch decision, designed to allow unions to gain access to the banking industry, has in fact yielded mixed fruit. There is now a sprinkling of collective agreements across the country, but employees have made no spectacular gains by them. Unorganized employees of the banks enjoy better wages and working conditions than ever before. No one can quarrel with this, but it scarcely promotes the policies of the Code. Most of the units that were certified in the first year of organizing have since had their certificates revoked, possibly because the pressure generated by trying to bargain effectively for a branch contract was too great. The question must be asked: was the branch certification decision a mistake?

⁶⁶ The first two decisions (*Victory Square* and *CUBE and Bank of Nova Scotia*) came down on June 10, 1977. *Gibsons #1* was heard on October 18-20, 1977.

⁶⁷ *Gibsons #1*, *supra* note 62, at 511 (di), 327 (Can. L.R.B.R.).

⁶⁸ *Id.* at 522 (di), 335 (Can. L.R.B.R.).

⁶⁹ *Id.* at 522 (di), 336 (Can. L.R.B.R.).

The reference to "choice of trade union" indicates the Board's perception that while a more established and better financed trade union might take on this organizing task, SORWUC could not. It is worth noting that a similar argument based on freedom of association was made but given no consideration in the *Kitimat* case.

⁷⁰ Unreported decision, Board File: 555-1013. [Hereinafter *Banque Provinciale*.]

The Royal Bank challenged the decision before the Federal Court of Canada. In what the Court characterizes as its "only substantial ground of attack,"⁷¹ the bank argued that the Board had based its decision on an erroneous perception that the public policy of Canada was to further collective bargaining. The Court upheld the Board's decision, but it is difficult to tell whether it agrees or disagrees with the fundamental basis of that decision. The Court's judgment is worth quoting at length:

There is no doubt that certain passages of the Reasons of the Board are so drafted as to lend some support to the Applicant's argument. This is regrettable since the duty of the Board is neither to facilitate nor to hinder the certification of Unions. However, a careful reading of the whole of the Reasons shows, in our view, that what the Board meant to say in those passages was merely that its discretion under section 125(2) of the Code was to be exercised so as to give the employees, in so far as possible, "a realistic possibility of exercising their rights under the Code." So understood, the decision of the Board, is in our opinion, unimpeachable.⁷²

This passage can only be described as delphic. It is beyond rational dispute that the Board's decision was dictated by what it perceived to be its mission, imposed by the Preamble and scheme of the Code, to promote collective bargaining. If the Court rejected this interpretation of the Code it ought surely to have quashed the decision.

In any case, the decision of the Board stands as the law of the bank cases: branch certification is legally unimpeachable. Is it equally unimpeachable from a policy point of view? It has certainly not had the dramatic effect on organizing that was anticipated. It may even result, after an initial flurry of organizing activity, in retarding bank organizing if workers and unions become demoralized about the frustrations of organizing and bargaining on a branch basis. The branch decision may not even have been absolutely necessary to give the unions an entry into the banks: SORWUC certainly didn't think so. These hypotheticals are still untested, and it is certain that if the Board had attempted to take them into consideration it would have had to deny the particular workers who approached them any effective participation in determining their terms and conditions of employment for the foreseeable future. It would also have deprived them, perhaps permanently, of the representative of their choice, since neither SORWUC nor CUBE had the resources to take on a larger scale campaign. Both of these results would have been subversive of important principles protected by the Code.

The branch decision did, however, give the bank employees and the labour movement maximum flexibility. While it stamped with official approval a very unsatisfactory bargaining format, it did not tie the participants down to that format. Thus, as all the parties anticipated, after some experience with branch-by-branch organizing and bargaining, union organizers are seeking broader-based units. The *Victory Square*⁷³ and *Gibsons #1*⁷⁴ decisions go

⁷¹ *Royal Bank of Canada v. SORWUC*, unreported decision of the Federal Court of Appeal, Court No. A-849-77.

⁷² *Id.* at 1-2.

⁷³ *Supra* note 37.

⁷⁴ *Supra* note 62.

no further than deciding that a single branch is a unit appropriate for collective bargaining. They strongly imply that other units would also be appropriate or even more appropriate. The decisions themselves, however, give little guidance as to what lines the Board might be prepared to draw.

One subsequent decision helps to fill in at least one of the blanks. In *Bank of Montreal, Clinton Branch*,⁷⁵ the union sought certification for a group of employees who worked in what was, at the time of the hearing, merely a sub-agency of a larger branch.⁷⁶ The Board found that the close administrative relationship between branch and sub-agency militated against separate certifications.

Currently, union organizers appear to be searching for a unit that is larger than a branch, yet organizationally manageable. The obvious next step is a regional unit, which is certainly not ruled out by the *Gibsons #1*⁷⁷ and *Banque Provinciale*⁷⁸ cases. In fact, both of those decisions contain language indicating the desirability of regional units. It is possible that the labour relations role of the region may differ from bank to bank, but, on the basis of the Board's "community of interest" criteria developed to date, it is unlikely that a regional unit would be deemed inappropriate.

Regional certification, however, is not yet a practical possibility for union organizers, despite SORWUC's initiative to organize British Columbia. The quest is still for smaller units. The Board has already ruled that a data centre of a bank is an appropriate unit, although no union has yet been certified for one.⁷⁹ The question of the appropriateness of district offices, chargex centres and central processing facilities was mooted in *Gibsons #1*,⁸⁰ but the employer conceded in argument that such units would be appropriate on their own, and in the context of branch organizing it is difficult to see how the Board could come to any other conclusion. In a case predating the *Victory Square* decision by several years, an application for a *quasi*-craft unit of IBM operators engaged in clearing operations in the Banque Canadienne Nationale was rejected as inappropriate.⁸¹ This decision was rendered in a different philosophical climate and, for many reasons, it was not a "clean" craft application.⁸² Nevertheless, there is no reason to believe that it would not be followed today. The CLRB is not sympathetic to craft fragmentation, and it serves no useful purpose that would not be better served by branch certi-

⁷⁵ (1977), 24 di 198, [1978] 1 Can. L.R.B.R. 157.

⁷⁶ At the time that the union applied for certification, the location in Clinton was a self-contained branch. Subsequent reorganization, found not to be improperly motivated, made it a sub-agency of the Ashcroft branch. The union is now certified for a unit comprising both the branch and the sub-agency, and has signed a contract.

⁷⁷ *Supra* note 62.

⁷⁸ *Supra* note 70.

⁷⁹ One of SORWUC's initial applications was for a data centre of the Bank of Nova Scotia. The application was dismissed when the union lost a representation vote.

⁸⁰ *Supra* note 62, at 538 (di), 349 (Can. L.R.B.R.).

⁸¹ *Supra* note 20.

⁸² The union's proposed unit did not include all IBM operators, or even all IBM operators engaged in clearing operations. *Id.* at 975.

fication. Craft-type employees excluded from branch units would, however, undoubtedly get a more hospitable reception.

As to what groupings of branches it might consider appropriate, however, the Board has, as yet, given the unions no guidance. Possibilities include city and metropolitan units, labour market areas, bank employee recruitment districts, areas linked by single data centres, or even provinces.⁸³

The Board's magic potion for the perceived problems of bargaining for very small units is that the parties themselves should develop by consensus larger and more efficient bargaining structures.⁸⁴ It speaks with enthusiasm of SORWUC's attempt to bargain a master contract in British Columbia.⁸⁵ This, of course, is the common sense position. It overlooks, however, the fact that, for the foreseeable future at least, positions on bargaining format will be dictated by strategic rather than logical considerations. SORWUC's desire to bargain in common for all branches of all banks reflected its conviction that this was the most rational structure within which to set terms and conditions of employment. One of the union's organizational rallying cries had been for an end to arbitrary action, favouritism and inconsistency in working conditions. This goal of uniformity would best be achieved by co-ordinated bargaining. It equally reflected crippling financial pressure which made bargaining on a branch-by-branch basis a practical impossibility. Co-ordinated bargaining was a practical solution to the problem of paying the bargaining committee. The banks' refusal even to consider this proposal—a proposal that would not only have been administratively more efficient but would also have given them a highly desirable multi-employer bargaining contract—can only have been motivated by a desire to obstruct effective bargaining in order to wear the union down and discourage other employees from unionizing. In the unit cases the banks had argued that branch-by-branch negotiating would reduce their centralized systems to anarchy. They obviously had much to gain by multi-branch bargaining. Yet, they were prepared to sacrifice long-term benefits for the short-term one of bankrupting SORWUC.

The parties cannot be expected to develop voluntarily rational bargaining structures until their collective bargaining relationship matures. The paradox is that, at least in this case, the relationship will never mature unless more rational bargaining structures are developed. It may simply wither and die. The Board made the right decision in sanctioning branch certification, but it must do more. It has already served notice that in difficult-to-organize industries it will take a continuing interest in unit determination: "The Board,

⁸³ By way of analogy, the NLRB has certified units such as these in the insurance industry in the U.S., an industry organized on lines somewhat similar to Canadian banking: see Hall "The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee Free Choice" (1967), 18 W. Res. L. Rev. 479, at 504-12, and Abodeely *The NLRB and the Appropriate Bargaining Unit* (Philadelphia: Univ. of Penn. Press, 1971).

⁸⁴ *Victory Square*, *supra* note 37, at 353-54 (di), 124-25 (Can. L.R.B.R.), 524-25 (C.L.L.C.).

⁸⁵ *Gibsons #1*, *supra* note 62, at 517 and 522-23 (di), 332 and 336-37 (Can. L.R.B.R.).

after a while, may consider that small existing units must be enlarged or amalgamated and will take an active part in that process."⁸⁶ Such parental supervision, as well as an imaginative approach to "combination" units proposed by trade unions, is crucial to the development of stable collective bargaining in the industry.

B. *Determining Employee Wishes: The Problem of Timing*

Under the Code, certification depends on a showing that the union represents a majority of employees in a unit appropriate for collective bargaining. Absent evidence casting doubt on the validity of the union's membership cards, the Board will usually certify, without a vote, any union with a majority of the unit signed up as members. If the union has between thirty-five and fifty percent membership, a representation vote will ordinarily be held,⁸⁷ and the union will be certified if a majority of the employees who cast their ballots vote in its favour. The Board has the discretion to order a vote for a union with less than thirty-five percent membership,⁸⁸ but this discretion is exercised only in unusual circumstances.

Timing is crucial for a union in a small-unit, high turnover industry. As of what date must a union show majority support before it will be certified without a vote? What will be the effect of changeover in personnel before certification? If the union is not able to show majority support as of the relevant date, who will be allowed to vote in any representation election? The answers to these questions have differed materially throughout the bank organizing campaign, and, as the following discussion shows, the difference has been of the utmost importance to union organizing campaigns.

Prior to June 1, 1978, and therefore at the time that the first bank cases were heard, the Code provided that if, *inter alia*, the Board was "satisfied that a majority of employees in the unit wish to have the trade union represent them as their bargaining agent,"⁸⁹ then the Board must certify the union. In *Swan River — The Pas Transfer Ltd.*,⁹⁰ the Board faced the question of the relevant date for determining these employee wishes. In a judgment setting out at persuasive length both the statutory and policy bases for its decision, it concluded that the Code's goal of industrial peace would be best served by using the date of application as the cut-off date. It reasoned as follows:

[M]any specialists in the field, we would venture to say the majority, claim that industrial peace is bound to be disrupted for long periods of time if the Board has to take into consideration events that take place between the date of the Application and any subsequent date.

Once it becomes known that after the deposit date the wish of the employees as expressed by the serious commitment of signing a card, accepting to be bound by a constitution and disbursing monies for union dues can be changed by a num-

⁸⁶ *C.P. Ltd.*, *supra* note 60, at 32 (di), 369 (Can. L.R.B.R.), 493-94 (C.L.L.C.).

⁸⁷ *Canada Labour Code*, R.S.C. 1970, c. L-1, as am. by S.C. 1972 c. 18, s. 127(2).

⁸⁸ *Id.*, s. 127(1). This discretion was exercised to allow a vote in a number of bank cases where the reason for the less than 35% membership figure was attrition due to the passage of time.

⁸⁹ *Id.*, s. 126.

⁹⁰ (1974), 4 di 10, [1974] 1 Can. L.R.B.R. 254, 74 C.L.L.C. ¶16,105.

ber of circumstances and affect the decision of a Labour Board, one will invite a chaotic labour relations situation.

For example:

1. one would be bound to allow the union to pursue an active campaign among the employees in order to add to the list of members already filed in at the date of the Application. This practice is not followed today when the application date is the terminal date and to do so would make for disruption in the work force.
2. one would be inviting some employers to go in for outright campaigning against the union aimed at persuading employees to change their minds. Also, one would be tempting some employers to commit unfair labour practices to foster resignations from the Union. This would in turn provoke the unions into active counter-campaigning. All of which creates chaos. One may object here that there are recourses under the law against employers who commit unfair labour practices. But this is of no assistance in the case of a sophisticated campaign where no unfair labour practice is capable of being proven and yet is so very effective in producing a change of mind or wish in the workers.
3. one would have to tolerate and deal with the intervention of a rival union only too glad to try its luck with an afterthought application filed because of the chaotic situation prevailing after the date of application.
4. one would have to study the roots of apparently legitimate or contrived substantial changes in the overall complement of employees in the unit after the application date.⁹¹

The best way to forestall all these evils, according to the Board, was to formulate a rule according to which such activity would be fruitless because it would not affect the outcome of a certification application. If the date of application were the relevant date for determining employee wishes, this would be the case.

Unfortunately, the Federal Court of Canada did not agree. In *CKOY*,⁹² a decision dated February 16, 1977, it rejected the *Swan River* interpretation of section 126 and advanced the opinion that employee wishes should be determined as of the date of certification.⁹³ As a result of this decision the Board was required to take cognizance of any expression of employee wishes, and hence of any change in bargaining unit composition at least up to the date of any hearing and possibly up to the date of actual certification as well.

The immediate administrative response of the Board was to enact regulations requiring that unless evidence of employee wishes was filed within ten days of application, the Board would not be required to consider it.⁹⁴ The initial applications of SORWUC and CUBE, however, fell between two stools. At the time that they were filed, *Swan River* was the law. The intervention of *CKOY* prevented the Board from disregarding evidence of employee wishes submitted after the date of application, but the Board's new regulation was passed subsequent to their filing. These applications, then, bore the full brunt of *CKOY*.⁹⁵ The union urged that the new regulations be given

⁹¹ *Id.* at 15-17 (di), 261-62 (Can. L.R.B.R.), 883-84 (C.L.L.C.).

⁹² *Supra* note 36.

⁹³ *Id.* at 425 (F.C.), 240 (D.L.R.), 200 (C.L.L.C.).

⁹⁴ S.O.R./77-237, [Hereinafter "*CKOY* regulation"].

⁹⁵ The *CKOY* decision came down on February 16, 1977. The new Board regulations came into effect on March 14, 1977. Most of the applications dealt with in these initial decisions were filed before either date.

retroactive effect, but the Board refused,⁹⁶ feeling compelled to consider evidence of employee wishes and unit changes right up to the date of the hearing.

As has already been pointed out, that involved an inordinate length of time. There was a high rate of resignation from the unions, and normal turnover made significant inroads into these units. The result was that, although the unions had enjoyed majority support in most of the branches involved on the date of application, only nine certifications took place on SORWUC's twenty-two applications. In some units support even fell below the thirty-five percent required in normal circumstances to hold a vote. The union lost in all cases, except one,⁹⁷ where it was necessary to hold a vote.

This was a serious setback for the embryonic bank organizing campaign. For applications filed subsequent to the new regulation, erosion of support was effectively halted after ten days, no matter how long it took to deal with the application. Serious problems remained, however, which even the regulation did not cure. Ten days is long enough for an employer to mount an effective anti-union campaign. Furthermore, although the Board regulation puts time limits on the expression of employee wishes, it took the position, consistent with *CKOY*, that it could not free itself by regulation from its obligation to look at changes in the composition of the bargaining unit after the date of application.⁹⁸ Such changes may have resulted from resignations, transfers, changes in complement or reorganization of the branch structure, among other things. The Board's only response to the organizing problems created by changes of this nature was to try to speed up the processing of applications.⁹⁹ This has not always been possible except in the most routine cases.

Fortunately for the Board and the unions, the legislature came to the rescue. One of the amendments to the Code in the June 1, 1978 package gave the Board the power not only to consider the date of application as the cut-off date for consideration of employee wishes, but also to set any *other* date that it considered appropriate.¹⁰⁰

In *Canadian Imperial Bank of Commerce, Sioux Lookout Branch*,¹⁰¹ the Board discussed these new provisions at length. It outlined a number of

⁹⁶ *Victory Square*, *supra* note 37, at 333 (di), 110 (Can. L.R.B.R.), 513 (C.L.L.C.).

⁹⁷ *Canadian Imperial Bank of Commerce* (1977), 25 di 355 at 373-76, [1978] 1 Can. L.R.B.R. 132 at 146-48. [Hereinafter *Victory Square* #2.] The Board notes that changes since the date of filing had reduced the union's membership in six out of eight units to less than 35%.

⁹⁸ See *Bank of Montreal, Tweed and Northbrook Branch* (1978), 26 di 591 at 600-601, [1978] 2 Can. L.R.B.R. 123 at 130-31.

⁹⁹ *Id.* at 601 (di), 130-31 (Can. L.R.B.R.).

¹⁰⁰ The amendment reads:

[Where the Board] (c) is satisfied that, as of the date of the filing of the application, or of such other date as the Board considers appropriate, a majority of the employees in the unit wish to have the trade union represent them as their bargaining agent, the Board shall, subject to this Part, certify the trade union making the application as the bargaining agent for the bargaining unit.

S.C. 1972, c. 18, s. 126(c) as am. by S.C. 1977-78, c. 27, s. 45, [Hereinafter the "CKOY amendment"].

¹⁰¹ (1978), 33 di 432, [1979] 1 Can. L.R.B.R. 18. [Hereinafter *Sioux Lookout*.]

situations in which it might determine that a date *later* than the date of application was the relevant cut-off. Of these, only one is of immediate relevance to the bank situation: where a representation vote must be ordered.¹⁰² Its implications will be discussed below. The Board then went on to discuss situations in which it will choose a date *prior* to the date of application.

The *Sioux Lookout* case itself involved an unfair labour practice complaint, as well as an application for certification. The union had signed up a majority of employees in the unit on June 5, 1978 and increased its majority the next day. It did not, however, apply for certification until June 8, 1978. In the interim the following events took place: (1) on June 6th the manager conducted a staff meeting, (2) on June 7th the General Manager and Personnel Manager for the Manitoba region conducted a staff meeting, (3) on June 7th an employee and union member who had given two weeks' notice of resignation was replaced and let go with pay before her notice period was up, (4) on June 7th a new consumer loans officer reported to the bank, and (5) on June 8th a new bank officer in training reported to the branch. The local manager had not been anticipating the arrival of these last two additions to his complement.¹⁰³ Making the almost unprecedented finding that the bank's Regional Personnel Manager had lied under oath,¹⁰⁴ the Board determined that these events were part of a strategy by the employer to "undermin[e] the union's numerical support in the branch bargaining unit and [defeat] the freedom of employees' [sic] in Sioux Lookout 'to join the trade union of his choice and to participate in its lawful activities' (section 110(1))."¹⁰⁵

The Board then discussed remedies. The union would still have a majority if the Board simply refused to consider the effect of transfers and replacements, and this is in fact what it did, but it made the following pronouncement: "If required to we would exercise our discretion under section 126(c), in this case, and determine June 6th to be the appropriate date for determining the wishes of the employees. On that date a majority of employees in the unit were members of the union."¹⁰⁶

This power to set earlier dates will be of great assistance in organizing. As the Board points out in this decision, unfair labour practice provisions are not adequate deterrents to employer attempts to influence employee free choice prior to certification:

The obvious redress is the prohibited conduct provisions of sections 184 and 186 of the Code but success on complaints under these sections often provides only a pyrrhic victory. An employer may be found to have violated the Code, but no certification is issued because at the date for determining employees' wishes the employer has achieved his objective.¹⁰⁷

Several of the provincial labour statutes contain provisions allowing certification without proof of majority status when an employer's unfair labour

¹⁰² *Id.* at 434 (di), 20 (Can. L.R.B.R.).

¹⁰³ *Id.* at 446 (di), 29 (Can. L.R.B.R.).

¹⁰⁴ *Id.* at 449 (di), 31 (Can. L.R.B.R.).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 449-50 (di), 32 (Can. L.R.B.R.).

¹⁰⁷ *Id.* at 438 (di), 23 (Can. L.R.B.R.).

practices have disrupted the situation to such an extent that a representation vote will be unlikely to reflect the employees' true wishes.¹⁰⁸ The Code provision does not go that far; the union must have had majority status at some point, even if it was prior to application, before it can be certified pursuant to this section.

In fact, the Code provision is potentially broader in some cases than most of the provincial statutes. *The Labour Relations Act* of Ontario, for example, limits the exercise of this extraordinary certification power to situations in which the employer has actually breached the Act.¹⁰⁹ The CLRB, on the other hand, is given complete discretion here and, although the *Sioux Lookout* case itself did involve unfair labour practices, there is no indication that this is a necessary trigger for the Board's discretion to set an earlier cut-off date. Employer conduct short of unfair labour practices, or even coercive conduct by someone other than the employer, may be sufficient to create an atmosphere in which the employees cannot freely express their wishes. In such cases the CLRB could intervene and certify the union whereas the Ontario Board could not.

There are still some problems caused by bargaining unit instability that are not solved by the new amendments to the Code. One such problem arises where it is necessary to conduct a representation vote. Some of the issues raised by the problem of determining a voting constituency are discussed in *Canadian Imperial Bank of Commerce, Alness Branch*.¹¹⁰ There the union's position was that people who became members of the unit after the date of application should not be able to vote.

The Board deals very casually and quite inadequately with this important question. It states:

It is a well-recognized principle in labour relations that a certification order relates to job functions and not to the individuals performing such functions. Accordingly, it is the employee performing the encompassed function at the time of the vote, whether on a permanent or a part-time basis, that will be entitled to vote.¹¹¹

Its conclusion does not, however, follow from its premises. A certification order in a non-vote situation equally applies to job functions rather than persons, yet in a non-vote situation the Board does not hesitate to disregard the wishes of incumbents if they have changed between the time of application and certification. If a different rule is to be applied for voting situations it must rest on a more persuasive foundation; the Board offers none.

¹⁰⁸ *Trade Union Act*, S.N.S. 1972, c. 19, s. 24 as am. by S.N.S. 1977, c. 70, s. 1(9); *The Labour Relations Act*, R.S.O. 1970, c. 232, s. 7 as am. by S.O. 1975, c. 76, s. 5; *Labour Code of British Columbia*, S.B.C. 1973 (2d Sess.), c. 122, s. 8(4)(e), 43(3).

¹⁰⁹ S. 7(a) of *The Labour Relations Act*, R.S.O. 1970, c. 232 as am. by S.O. 1975, c. 76, s. 5. The Nova Scotia statute is also limited to unfair labour practice situations, although the British Columbia Act is not (see section 43(3)).

¹¹⁰ (1978), 28 di 921, [1978] 2 Can. L.R.B.R. 361, 78 C.L.L.C. ¶16,145. The issue also arose as to whether women on maternity leave and their replacements could vote. The Board decided that the former could vote but that the latter could not.

¹¹¹ *Id.* at 930 (di), 368 (Can. L.R.B.R.), 538 (C.L.L.C.).

The *Alness* case was decided prior to the 1978 amendments, but it is probably still good law. In *Sioux Lookout*,¹¹² a post-amendment case, the Board indicated that it would use a date subsequent to the date of application as the cut-off date for determining employee wishes in cases where votes are held. In fact, the amendments do not address themselves to the criteria that the Board should use in the exercise of its discretionary power to determine who is eligible to vote.¹¹³ Thus we are left with the anomaly that a union with fifty-one percent support at the time of the application remains untouched by changes in the bargaining unit prior to certification, while a union with forty-nine percent can find that its support has completely evaporated, not because its supporters have changed their minds, but because the unit has expanded. Obviously, the few extra memberships can make a significant difference.

C. Union Organizing Campaign

The most widely publicized development in the bank organizing field following the CLRB's June 10, 1977 decisions was the establishment, by the Canadian Labour Congress in the fall of 1977, of the Bank Workers' Organizing Committee (BWOC). CLC unions had been conspicuously absent from bank organizing until just before the unit decisions. Nation-wide publicity surrounding those decisions as well as a request from SORWUC to the CLC for financial assistance threw this inactivity into embarrassing relief. The BWOC was the official CLC announcement that organized labour was finally prepared to champion Canada's bank workers.

The BWOC itself is an umbrella organization consisting of representatives of the CLC's ten largest unions,¹¹⁴ and was designed to co-ordinate a nation-wide campaign to organize bank workers. It employs two different *modi operandi*: organizing through affiliates and organizing through a special bank workers' union. Affiliated unions with a strong presence in a particular community are expected to organize bank workers in that community without regard to CLC jurisdictional boundaries, using their own personnel and financial resources to do so. Once organized, it is contemplated that these units will be given the opportunity to join the national bank workers' union. In March, 1978 ten CLC locals, collectively christened the Union of Bank Employees (UBE), were chartered to organize bank workers in the ten different regions of Canada. These locals are funded and serviced directly by the CLC. To date, the United Steelworkers of America is the only union that has been certified for bank units in accordance with the first branch of the plan.

¹¹² *Supra* note 101.

¹¹³ The Board is empowered by s. 128(1)(a) of the *Canada Labour Code*, S.C. 1972, c. 18, to "determine the employees that are eligible to vote" when a representation vote is ordered.

¹¹⁴ The members of the BWOC are Canadian Union of Public Employees, United Steelworkers of America, Service Employees International Union, Public Service Alliance of Canada, Canadian Brotherhood of Railway, Transport and General Workers, International Brotherhood of Electrical Workers, International Association of Machinists, Canadian Paperworkers' Union, International Woodworkers of America and United Autoworkers.

The BWOC was the scheme devised by the CLC to submerge jurisdictional difficulties in a united front to take on the banking industry, avoiding the friction that would inevitably result if the Congress were forced to allot banking jurisdiction to one among a number of competing unions. Unfortunately, the two CLC affiliates with the most colourable claims to jurisdiction in the banking industry, the OPEIU and the Retail Clerks' International Union (RCIU), refused to go along with the co-ordinated effort and struck out on their own. OPEIU, of course, already represented employees at the Montreal and District Savings Bank and was not prepared to accept any rivals in what it considered to be its historic preserve.¹¹⁵ It stepped up organizing efforts in Quebec, and its OTEU local began organizing in British Columbia as well, much to the chagrin of SORWUC.¹¹⁶ RCIU, with no real base in financial institutions in Canada, but with some history of bank organizing in the United States,¹¹⁷ launched an expensive, well-staffed organizing campaign at about the same time that the BWOC was founded.¹¹⁸ It has been operating largely in Ontario and Quebec. CNTU unions have also been active in the banking industry since the unit decision.

Amidst this kaleidoscope of organizing activity,¹¹⁹ what of SORWUC and CUBE, the unions that started it all? CUBE, as noted earlier, had no special commitment to bank workers. After negotiations with the CLC it was absorbed without much difficulty by the BWOC. The history of the relationship between SORWUC and the CLC is considerably more complex.

SORWUC, although it diverged ideologically from established trade unionism in many respects, had never taken a stand in principle against affiliation with the CLC. Nevertheless, by laying claim to a constituency consisting broadly of unorganized women, SORWUC had raised CLC jurisdictional hackles right from the very beginning. Thus, when SORWUC appealed to the CLC for financial assistance in paying the enormous legal bills generated by the landmark *Victory Square* decision, the CLC was unsympathetic; its response was that CLC money was for CLC affiliates only. SORWUC countered by offering to recommend CLC affiliation to its members.¹²⁰ The Con-

¹¹⁵ OPEIU has been the leader in U.S. bank organizing and holds the AFL-CIO charter to organize banks: see Coleman and Rose, "Bank Unionization: Status and Prospects," *White Collar Report*, No. 967, October 17, 1975, at C-1.

¹¹⁶ SORWUC complained to the CLC about OTEU interference with its organizing, but without success.

¹¹⁷ See Coleman and Rose, *supra* note 115, at C-1.

¹¹⁸ See "The Little Union That Couldn't," *Maclean's*, September 4, 1978. RCIU claims to have hired 22 bank workers as full-time organizers across the country, and to have a budget of "some millions of dollars" for bank organizing. This compares very favourably with the CLC's smaller staff and "million dollar war chest".

¹¹⁹ The unions involved in organizing U.S. banks are even more motley. Although U.S. banks are scarcely more densely unionized than Canadian banks, certifications are held by the Teamsters, UAW, ACTWU, Iron Workers, Communication Workers and Steelworkers, to name just a few. See Coleman and Rose, *supra* note 115, Table I. The Table shows 32 banks unionized, some dating back to the 1920's. Interestingly, one of them is the Bank of Nova Scotia in Puerto Rico.

¹²⁰ This history is documented by correspondence between the CLC and SORWUC, reprinted in *An Account to Settle*, *supra* note 27, Appendix.

gress, however, was not interested in SORWUC as an affiliate. It was prepared to accept Local 2 of SORWUC, the United Bank Workers, on the condition that it come in under the umbrella of the BWOC and put itself under BWOC direction and control. Understandably, this proposition did not appeal to a union firmly committed to the principles of autonomy for individual bargaining units and the solidarity of working women. SORWUC continued without CLC affiliation.

The CLC viewed an affiliated SORWUC as an unmanageably disruptive influence on an already tense jurisdictional situation. Its decision to reject SORWUC's affiliation proposal is not entirely without rational basis. It may have acted properly in conserving its own resources for affiliates, although this is more doubtful. It did not stop there, however. It used its prestige to cut off the donations of its affiliates to the struggling SORWUC. Throughout the bank organizing campaign, SORWUC had been heavily dependent on funds donated by other unions, many of them CLC affiliates.¹²¹ When it became clear that SORWUC was not going to submit to the Congress's dictates, the CLC took the steps that were open to it to ensure that affiliates' money did not go to SORWUC. A circular was sent out from the head office advising affiliates of the formation of the BWOC and appealing for the support of the entire labour movement in a united front for this CLC endeavour. Affiliates read between the lines and advised SORWUC that they were unable to make further donations to the United Bank Workers. Even more directly, CLC representatives for the western region, presumably on instructions from Ottawa, made explicit requests to affiliates not to give money to SORWUC. Not all trade unions, particularly in British Columbia, submitted to the CLC interference and this did not entirely stop the flow of funds, but it certainly slowed it down significantly. This CLC action was fatal to SORWUC and contributed in no small part to its eventual paralysis at the bargaining table and withdrawal from active participation in bank organizing.

After the June 10, 1977 decisions, SORWUC continued to organize for several months. In the balance of 1977 it made twenty-three more branch applications, of which sixteen were successful. Two of these branches were in Saskatchewan; all the rest were in British Columbia. In January, 1978, the unions made a policy decision to switch from branch organizing to organizing on a province-wide basis. After this, only one more branch application was made.¹²² For reasons discussed in detail below SORWUC withdrew from bargaining at twenty-four of its twenty-six units in the summer of 1978, and has since withdrawn from the last two: the Saskatchewan units. Concluding from its experiences that only larger units will be able to extract meaningful concessions from the banks, its current plan is to organize province-wide in British Columbia.

¹²¹ Since SORWUC began organizing in the banks it has received a total of approximately \$50,000 in donations from unions. CLC unions contributed \$20,000, \$10,000 came from unions affiliated with the Canadian Confederation of Unions, and \$20,000 came from unaffiliated unions. *SORWUC News*, Summer 1978, at 14.

¹²² This was a successful application at a Commerce branch in Creston, British Columbia, filed under pressure from the Creston employees despite the "no branch application" policy.

Despite the fact that so many unions have begun to show an interest in the banking sector, the venture cannot, at least as yet, be called a success.¹²³ The number of certifications is insignificant compared to the number of bank branches, and the rate of increase is very slow. There has been a significant number of decertifications, not all of them in SORWUC units, and there are more such applications before the Board. Many of the certified units have not yet signed first contracts. Banking is still, for all practical purposes, unorganized. Why is this the case?

D. *Bank Counter-Campaign*

1. CLRB Response to Bank Tactics

The banks, of course, have a large stake in keeping unions out of the industry, and they have not been indifferent to the organizing efforts. Their counter-campaign has taken a variety of forms ranging from the clearly legal to the clearly illegal.

Several of the employers' counter-tactics raise issues as to the permissible range of "employer free speech" in representation campaigns. A very common practice with many, if not all, of the banks is for management to hold what are known in labour relations parlance as "captive audience" meetings. The legality of such meetings in the bank context has been considered, either directly or indirectly, by the CLRB in a number of cases.

In *Bank of Nova Scotia, Selkirk Branch*,¹²⁴ the union applied for certification with a majority. Between the time of the application and the hearing, most of the employees withdrew from the union and the Board ordered a representation vote. The union filed an unfair labour practice charge and requested certification without a vote, alleging, *inter alia*, that two "captive audience" meetings held with the employees during the organizing campaign were improper.

Both of these meetings were conducted by senior management personnel from the regional office. The first meeting was one of a series that regional management had been conducting throughout the region to inform employees of the terms and conditions of employment, including recently instituted ombudsman procedures and a new dental plan. They did not deal directly with the subject of unionization. The inference is clear, however, that both the

¹²³ As of mid-March, 1980, the record stood as follows:

- (1) SORWUC – 26 certifications, all revoked (24 in British Columbia, 2 in Saskatchewan),
- (2) CUBE – 3 certifications (Ontario),
- (3) OTEU – 3 certifications (British Columbia),
- (4) United Steelworkers of America – 3 certifications (1 each in British Columbia, Saskatchewan and Quebec),
- (5) RCIU – 28 certifications, 2 revoked (8 in Ontario, 17 in Quebec, 1 in Manitoba, 2 in British Columbia),
- (6) UBE – 26 certifications (2 in British Columbia, 17 in Ontario, 4 in Nova Scotia, 3 in New Brunswick),
- (7) CNTU – 12 certifications (Quebec).

¹²⁴ (1978), 27 di 690, [1978] 1 Can. L.R.B.R. 544. [Hereinafter *Selkirk*.]

new benefits and the series of informational meetings were part of a deliberate bank policy to persuade employees that they did not need a union. Furthermore, there was testimony from management itself that the timing of the visit to this particular branch to coincide with the organizing campaign was not accidental.¹²⁵ The second meeting dealt specifically with union-related issues.

The Board encourages a policy of strict employer neutrality on representation issues. It is quite clear, however, that an employer may deviate considerably from this ideal without entering the realm of illegality. In considering the effect of these two meetings on the certification proceedings, the Board promises a posture of strict scrutiny of employer behaviour:

The scope of permissible employer communication to employees about employment relations matters and union affairs at the time of discussion among employees about exercising their right to be represented by a union is necessarily limited. Words from an employer have an impact that is far more personal and immediate than those from politicians or many others who affect an employee's life. A threat or a promise, no matter how veiled, is quickly translated by an employee into tangible consequences that can have a serious and readily perceived cost to the employee. To minimize and discourage this trauma for employees and promote an environment where employees can and do feel confident their right under section 110 is real, the Board in administering section 184 and 186 places rigid limitations on employer communications.¹²⁶

It then proceeded to spell out three areas in which the employer may communicate with employees during an organizational campaign: (1) to reply to inaccurate propaganda, (2) to state facts on issues directly affecting him, and (3) to publicize accurately existing terms and conditions of employment.¹²⁷

These exceptions are capable of fairly broad interpretation and, not surprisingly, the Board found the employer's conduct to fall within them, although it does not specify which one. There is no analysis whatsoever of the precise nature of the disputed discussions nor the effect of the "captive audience" context.

The Board is not always so tolerant of "captive audience" speeches, however. In *Bank of Montreal, Tweed and Northbrook Branch*,¹²⁸ the situation was similar to that in the *Selkirk* case: the union applied for certification with a majority only to have that majority evaporate before the hearing. The union requested that the Board give no weight to employee changes in sentiment—a remedy that would have resulted in automatic certification. The basis of the complaint was again two "captive audience" meetings, this time conducted by the manager of the branch, and a series of private meetings also conducted by the manager. All these events took place after the application for certification had been filed.

The subject of the first meeting was the union application. The employees were not specifically discouraged from exercising their right to collective bargaining, but the manager clearly conveyed the impression "that they would

¹²⁵ *Id.* at 692 (di), 546 (Can. L.R.B.R.).

¹²⁶ *Id.* at 698-99 (di), 551 (Can. L.R.B.R.).

¹²⁷ *Id.* at 699 (di), 551 (Can. L.R.B.R.).

¹²⁸ (1978), 26 di 591, [1978] 2 Can. L.R.B.R. 123. [Hereinafter *Tweed*.]

receive adequate attention to their grievances on an individual basis and that union representation would offer no more."¹²⁹ The second meeting was described as "a very emotional event":¹³⁰ the manager informed the employees that their unionization was a "damaging and personal affront,"¹³¹ and that he felt that he should ask for a transfer under the circumstances.¹³² The private meetings consisted of discussions of existing terms and conditions of employment, and the solicitation of individual grievances.

The Board was prepared to find "undue influence" in all of this and hence a violation of the Code. The suggestion that the manager would seek a transfer was characterized as a "definite implicit threat, or at least apprehension, of the unknown. . . ."¹³³ Furthermore, it took a very dim view of the manager's appeal to the loyalty of his employees:

In our current administration we must not restrict our appreciation of undue influence to heavy handed tactics that entrepreneurs of small establishments employed in the social climate of earlier years. We must be sensitive to the readily understood position of a manager in a modern corporate bureaucracy and the authority he has, which in terms of employment conditions may be severely restricted. He is assigned a difficult role, which the employees appreciate, and seeks to engender personal loyalty to perform his responsibilities and the support of his staff. If he deliberately or unthinkingly places that loyalty or the consequences of the employees' choice on his career as the price of employee exercise of their freedom to be represented by a trade union, the interference with the employees' freedom is synonymous with the entrepreneur's exercise of his economic authority.¹³⁴

The Board has not been consistent in its treatment of appeals to employee loyalty. In *Canadian Imperial Bank of Commerce, Gibsons Branch*,¹³⁵ the manager met with the employees on learning that they had applied for certification. Once again, the meeting was described as "very emotional," and the manager spoke of applying for a transfer, indicating that he was personally affronted by the "terrible thing" that his "happy little working group—a family" had done.¹³⁶ Many of the employees, including the manager himself, were in tears at the end of the meeting.

There was further evidence, however, that the manager had attempted later in the same day to repair any damage that he might have done. He called the employees together a second time, apologized for his behaviour, and advised them that he was not attempting to influence them on the unionization issue. Despite its strong language in *Tweed*, the Board could not find on the basis of this sequence of events an attempt to influence the employees to withdraw from the union, nor even any evidence of anti-union sentiment.

¹²⁹ *Id.* at 611 (di), 139 (Can. L.R.B.R.).

¹³⁰ *Id.* at 609 (di), 137 (Can. L.R.B.R.).

¹³¹ *Id.* at 611 (di), 139 (Can. L.R.B.R.).

¹³² *Id.* at 609 (di), 137 (Can. L.R.B.R.).

¹³³ *Id.* at 612 (di), 139 (Can. L.R.B.R.).

¹³⁴ *Id.* at 612 (di), 140 (Can. L.R.B.R.).

¹³⁵ Unreported decision, Board File: 745-293, [Hereinafter *Gibsons* #2].

¹³⁶ *Id.* at 5.

One thing is clear from the Board's handling of these cases: it is not prepared to formulate any *per se* rules about "captive audience" meetings or about the use of particular employer stratagems. However desirable it may be from a labour relations point of view for the Board to preserve its flexibility in this area, this kind of approach poses problems.

One of these problems is analytical. The unfair labour practice provisions of the Code prohibit employers from intimidating or threatening employees in the exercise of the rights guaranteed by the Code.¹³⁷ In the past, the Board quite properly refused to require a complainant in making his case to prove that he was actually intimidated, or that the employer's threats had the desired effect, considering it sufficient if the complainant proved that the employer's actions tended to have the prohibited effect. This doctrinal position has been somewhat obscured by the Board's free-wheeling approach to "employer free speech" issues in the bank cases. It is not easy to distinguish these three cases on their facts. In *Selkirk*, the Board exonerated the employer's conduct. It pointed to several highly suspicious circumstances surrounding the meetings with the employees: "In other circumstances the environment of the meeting (a captive audience situation), the status of the senior strangers to the branch and the timing of the visits might very well lead us to assess that the Code had been breached."¹³⁸ However, in the "overall circumstances"¹³⁹ (that useful piece of boilerplate) it was not prepared to find a breach here. The crucial factor apparently was the lack of causal relationship between employer conduct and employee withdrawals from the union.

Likewise in *Gibsons #2*, although the emotional appeal by the manager to the employees' loyalty was even more blatant than in the *Tweed* case, that appeal had no discernible effect at the time because no employees withdrew from the union and the union was, in fact, certified. The Board comes very close to basing its finding of "no breach" on the fact that no "complications" arose.¹⁴⁰ In *Tweed*, where complications did occur, the Board found similar conduct a violation of the Code.

In *Selkirk*, of course, the Board could quite properly have refused the union the *remedy* that it sought—automatic certification—if the employer's conduct were found not to have caused the situation of which the union complained. Nevertheless, the employer should not have been exonerated. Likewise, in *Gibsons #2*, the Board may well have felt that it was promoting good labour relations by allowing the employer a *locus poenitentiae*: if the manager repented his improper conduct and no damage had been done, no useful purpose would be served by awarding a remedy. Nevertheless, doctrinal consistency demands that the conduct be labelled unlawful even if no remedy is awarded.

Aside from doctrinal consistency, however, the Board's approach is open to the much more serious charge that it fails to provide direction to the

¹³⁷ *Canada Labour Code*, S.C. 1972, c. 18, s. 184.

¹³⁸ *Selkirk*, *supra* note 124, at 699 (di), 552 (Can. L.R.B.R.).

¹³⁹ *Id.*

¹⁴⁰ *Supra* note 135, at 18.

parties at a highly sensitive stage in their relationship. The Board may preach employer neutrality but it is not likely to see it unless it can demonstrate that brinksmanship does not pay. Clearly, such conduct *does* pay in this game. To focus on just these three cases, the employer was successful with highly emotional appeals to employee loyalty, "captive audience" meetings, and strategically timed visits from regional office personnel, despite the fact that the Board condemns all these practices. The odds are in favour of the employer, and undoubtedly incidents like these will continue to occur until the Board is prepared to formulate some *per se* rules or, at least, some stringent guidelines for employer participation in representation campaigns.

Labour boards have traditionally been cautious in the area of "employer free speech," but they have been much stricter in their scrutiny of employer conduct other than speech, and the CLRB has been no exception in dealing with the bank cases. It has ruled unequivocally against two other employer techniques for interfering with organizing activity: (1) manipulation of branch complement, and (2) anti-union discharge.

The issue of unit manipulation emerges most blatantly in *Sioux Lookout*, discussed above.¹⁴¹ In that case the union was able to prove that the employer artificially swelled the unit after he became aware of the organizing drive in order to defeat the union application for certification. The Board remedy was simply not to count those employees who had been illegally transferred into the unit in calculating the percentage of union membership. Presumably, it would also have denied these people a place on the voters' list if it had been necessary to call a vote.

Sioux Lookout, however, was an exceptional case. In an industry characterized by extremely high turnover, deliberate unit manipulation is difficult to prove. In *Sioux Lookout*, the union case was made by the testimony of an unusually candid branch manager. It was the conflict between his testimony and that of the regional personnel manager that led the Board to the key conclusion that the regional officer had perjured himself. Unions do not often enjoy such luck; thus, unit manipulation will continue to be a problem, at least to the extent that it is still relevant after the *CKOY* amendment to the Code.

The banks have not often been so crude as to employ the time-honoured technique of anti-union discharge, and the two cases in which the Board has had to deal with the issue involve extremely complicated sets of facts. The first case, *Gibsons #2*,¹⁴² discussed earlier in the context of "captive audience" meetings, involved the post-certification lay-off of the union's principal organizer and spokesperson. The bank's evidence was that this layoff was for strictly economic reasons. She was the junior teller.

Several months later, this scenario was repeated. Once again, the union's chief spokesperson was the unlucky victim of a layoff. This time she was *not* the junior teller.

¹⁴¹ *Supra* note 101.

¹⁴² *Supra* note 135.

There was some reason to suspect the necessity of any layoffs at all. The branch was a new one and the volume of business had not yet stabilized. In fact, very shortly after the case was decided, to the embarrassment of the Board, two new tellers were hired at Gibsons, suggesting at the very least that these layoffs were premature, if not improperly motivated. Furthermore, all banks follow a general policy of reducing their complements by attrition. Layoffs are extremely rare—so rare so as to have raised immediate apprehension in the minds of the Gibsons employees that anti-union motivation was involved.¹⁴³ The union laid a complaint with respect to the second layoff.

The Board found no unfair labour practice. It must be remembered that, under the Code at the time that the case was heard, the charging employee had the burden of proof in all unfair labour practice cases.¹⁴⁴ In the face of the employer's carefully documented evidence that the layoffs were economically necessary, the Board was not prepared to infer anti-union motivation. Taking refuge behind the capacious phrase "exclusive managerial discretion,"¹⁴⁵ it dismissed the complaint.

Nine months and a good deal of bank experience later one can see the Board looking at bank evidence of business justification with a much more jaundiced eye. In *Canadian Imperial Bank of Commerce, Toronto*,¹⁴⁶ the union issued a broad challenge to the employer's conduct in the face of organizing campaigns. More specifically, it challenged the layoff of a teller and the discharge of a loans clerk, both union activists.¹⁴⁷

The bank's justification for the layoff was the same as it had been in *Gibsons #2*, economic necessity, and it was able to lead similar evidence to bolster its position. The union, however, having learned the lesson of *Gibsons #2*, did not rely wholly on circumstantial evidence to buttress its case. It was able to show a pattern of anti-union activity on the part of senior management that led overwhelmingly to the conclusion that the teller had been laid off because of her union activity.

The case of the loans clerk was not quite as clear as that of the teller. His involvement in union organizing was not as public as hers, and he was discharged allegedly for incompetence. The evidence that his performance was less than satisfactory was fairly conclusive.¹⁴⁸ Nevertheless, there was evidence that the employer was aware of his union involvement, and the procedures surrounding his dismissal differed sufficiently from the norm to give rise to the inference that his union activity was at least a "culminating inci-

¹⁴³ *Id.* at 7.

¹⁴⁴ The 1972 version of s. 188(3) of the Code failed to specify that the burden of proof was on the employer although it did provide that the complaint would be evidence of a breach of the Code.

¹⁴⁵ *Gibsons #2*, *supra* note 135, at 21.

¹⁴⁶ (1979), 34 di 677, [1979] 1 Can. L.R.B.R. 391. [Hereinafter 199 *Yonge Street*.]

¹⁴⁷ The unions also challenged the failure to hire a third person who was linked to the union activists, but the evidence concerning her was very unsatisfactory and the Board found no unfair labour practice in her case. *Id.* at 698 (di), 407 (Can. L.R.B.R.).

¹⁴⁸ *Id.* at 694 (di), 404 (Can. L.R.B.R.).

dent.”¹⁴⁹ The Board was prepared to conclude in his case as well that the employer had breached the Code.

The actions of regional and branch management in this case are worth reviewing in detail for the insight that they give into bank strategies in the face of union organizing. Several months before the union's first organizational meeting at the branch, two “captive audience” meetings were held by the branch manager in which unionization was discussed, with specific focus on a document discussed in more detail below.¹⁵⁰ Personal interviews with each employee at 199 Yonge Street were conducted by three personnel officers from regional office in which both general employment and unionization matters were discussed. The teller's interview consisted of an attempt to obtain her resignation. Other events included: a suspiciously-timed reduction in the part-time branch complement; a devious procedure designed to secure the teller's official resignation from her full-time position before laying her off from her part-time position; a meeting attended by regional and branch officers in which unionization at the branch was discussed and the probable union sentiments of each employee at 199 Yonge Street were canvassed; a second meeting attended by the same people during which individual files of some of the branch employees were discussed; and a speech by the assistant manager at a regular staff meeting on the subject of unions, warning employees that they might be visited in their homes by union organizers and advising them that they had a right to refuse admission to union organizers.

There is no evidence that this branch had any special status in the Commerce organization. It is in the downtown commercial area of Toronto, but it is by no means the largest or most important of the bank's branches in that area. The obvious inference to draw from this record is that this kind of attention is routine in branches considered to be “vulnerable.”

After almost three years of bank organizing, a clear pattern of employer anti-union activity is starting to emerge. Unions have been able to trace this anti-union campaign at least as far up the hierarchy as regional office,¹⁵¹ and its similarity across the country leads irresistably to the conclusion that it is orchestrated by head office.¹⁵² The nature and intensity of the campaigns vary from bank to bank, but some generalizations can be made.

All banks have hastened to improve wages and working conditions for their non-unionized employees to an unprecedented extent.¹⁵³ They have also

¹⁴⁹ *Id.* at 696 (di), 405-406 (Can. L.R.B.R.).

¹⁵⁰ See text accompanying note 157, *infra*.

¹⁵¹ The deep involvement of the regional offices in 199 Yonge Street, *supra* note 146, *Sioux Lookout*, *supra* note 101, and *Canadian Imperial Bank of Commerce*, (1979), 34 di 651, [1979] 1 Can. L.R.B.R. 266, 80 C.L.L.C. ¶16,001 [Hereinafter *Kamloops*, to be discussed *infra*] is incontrovertible. All these cases involved the Bank of Commerce.

¹⁵² The Board recognizes head office involvement in its most recent decision, *Canadian Imperial Bank of Commerce*, unreported decision, Board Files: 745-422, 426 and 427 at 20. [Hereinafter *CIBC*.]

¹⁵³ The banks in general introduced across-the-board wage increases of 5-6% in 1977 and 9% in 1978. The new Bank of Nova Scotia dental plan is noted in *Selkirk*, *supra* note 124, at 691 (di), 545 (Can. L.R.B.R.).

taken a much more "personal" interest in employee grievances.¹⁵⁴ Regional offices are carefully monitoring pro-union sentiment and are attempting to forestall problems that may lead employees to unionization. They are also keeping sensitive fingers on the pulse of the organizing campaign; regional forces are obviously ready to swing into action at the first alert to the appearance of a union organizer at any branch.

"Captive audience" meetings and personal interviews are commonplace at this stage. The banks are also circulating an extensive document among their employees containing, in question and answer format, selected information about unionization. A large segment is reproduced in the *Sioux Lookout* decision; although it avoided labelling the distribution of the document an unfair labour practice, the Board characterized it, at least in part, as "clearly intending to point an employee away from trade unions."¹⁵⁵ Characteristic of its tone is this exchange:

Q.—Is it true that a trade union could become certified with the support of only 18% of the employees in any given unit?

A.—Yes, this is possible. Where more than 35% but less than a majority of employees sign trade union cards, the trade union may make application to be certified. If a vote was ordered and only 35% of the employees bothered to vote then 18% could constitute the majority required for certification. This is possible because the decision is based on the wishes of the majority of those voting not of those in the unit, even though the whole unit would then be certified.¹⁵⁶

This is not untrue, of course, but it is calculated to engender an atmosphere of panic and suggest to employees that, if they are not extremely vigilant, they will have a union thrust down their throats.

2. Burden of Proof and Remedies

At least some of the employer tactics discussed above will be rendered ineffective by the CKOY amendment to the Code providing that, in general, the relevant date for determining employee wishes is the date of application.¹⁵⁷ Employer counter-campaigning after a certification application has been filed with majority support will be futile in preventing certification. Nevertheless, the issues raised by these cases are still extremely relevant. For example, the manipulation of the complement can still affect an organizing campaign where it is necessary to call a vote, as can any other coercive tactic. Furthermore, the employer, in recognition of the fact that under the law now in effect he must counter-campaign early or not at all, is intervening before applications have been filed, before majorities have been signed, and in some cases, even before organizing has begun in a particular branch. Unfair labour practices committed at these earlier stages are much more difficult to prove

¹⁵⁴ Several banks have implemented ombudsmen or informal grievance procedures for the first time. The Scotia Action plan is noted in *Selkirk*, *supra* note 124, at 691 (di), 545-46 (Can. L.R.B.R.).

¹⁵⁵ *Supra* note 101, at 447 (di), 30 (Can. L.R.B.R.).

¹⁵⁶ *Id.* This document receives adverse comment again in *CIBC*, *supra* note 152, at 22.

¹⁵⁷ See text accompanying notes 87-99, *supra*.

and much more difficult to remedy. Therefore, the Board's approach to questions of proof and questions of remedy warrants examination.

The June 1, 1978 amendments brought the Code into line with most other Canadian labour legislation in shifting the burden of proof to the employer in cases where anti-union discharge, discipline or discrimination is alleged.¹⁵⁸ Although there is no suggestion in the *Gibsons* #2¹⁵⁹ case that the evidence was so finely balanced as to turn on burdens of proof, there is no doubt that when the Union of Bank Employees brought similar facts before the Board in the 199 *Yonge Street* case,¹⁶⁰ its task was made easier by the intervention of the Code amendments. The shift in burden of proof does not apply, however, to more generalized complaints such as those under section 184(1).

The Board has generally required that a charging party prove an anti-union motive, although the prohibited motive need not be the only one or even the predominant one. In a recent decision, however, it indicated a new direction.¹⁶¹ That case concerned the legal status of a management directive to employees to cease wearing Canadian Labour Congress lapel pins to work. The union had not yet applied for certification at the time that the complaint was filed.

Although the Board found anti-union motivation in the management directive involved here, it made, for the first time, the extremely significant suggestion that anti-union motivation may not be an absolute requirement in unfair labour practice cases.¹⁶² It outlined three possible classes of cases under the Code: (1) those in which the Code specifically requires motive as an element, (2) those in which the Code specifically prohibits certain effects regardless of motive, and (3) those "that prohibit employer acts that interfere with legitimate employee or union rights or collective bargaining interests without sufficient or legitimate, managerial, entrepreneurial or collective bargaining justification."¹⁶³ The last category would require the Board to balance the employer-employee-union interests involved, with motive being the determining factor only where the balance is even.¹⁶⁴

The *Kamloops* decision gives no examples of this third category, and it is unclear at this point how it will be used.¹⁶⁵ It may be that it will simply

¹⁵⁸ *Canada Labour Code*, S.C. 1972, c. 18, s. 188(3) as am. by S.C. 1977-78, c. 27, s. 67.

¹⁵⁹ *Supra* note 135.

¹⁶⁰ *Supra* note 146.

¹⁶¹ *Kamloops*, *supra* note 151.

¹⁶² *Id.* at 668-671 (di), 279-81 (Can. L.R.B.R.), 14,011-14,013 (C.L.L.C.).

¹⁶³ *Id.* at 671 (di), 281 (Can. L.R.B.R.), 14,013 (C.L.L.C.).

¹⁶⁴ This interest-balancing language suggests that the Board may be venturing into paths already covered, with conspicuous lack of direction, by U.S. jurisprudence. For an analysis of the confused court decisions in this area see Gorman, *Labor Law* (St. Paul: West Publishing Co., 1976) at 336-38.

¹⁶⁵ The discussion is confined to the issue of whether anti-union *animus* is required for a violation of section 184(1) and the Board says nothing about whether it is necessary under section 184(3). *Supra* note 151, at 281 and 284.

solve some of the union's evidentiary problems without making any dramatic changes in the substantive law. Nevertheless, it is an important step in the direction of imposing meaningful controls on employer conduct that interferes with employee organizing activity, since in theory at least it puts limits on all employer conduct, no matter how it is motivated, that interferes with employees' organizational rights to a significant extent.¹⁶⁶

Where the employer fires an employee for union activity, remedies are fairly obvious: reinstatement and back pay go a long way toward compensating the employee for his injury. More complex remedial questions arise when the employer's conduct has eroded the union's majority, prevented it from acquiring a majority, or aborted a campaign entirely. The Board has evolved fairly effective mechanisms for dealing with the eroded majority. Prior to the *CKOY* decision,¹⁶⁷ the erosion of a majority between application and hearing could be ignored, since employee wishes were determined as of the date of application. After the *CKOY* decision, but prior to the June 1, 1978 amendments, a majority lost between application and hearing could mean dismissal or a vote. If, however, the Board found that withdrawals from the union were induced by employer misconduct, it simply ignored them as involuntary and certified without a vote on the basis of the prior majority.¹⁶⁸ After June 1, 1978 erosion of membership support between application and hearing became largely irrelevant, but membership withdrawals before application could still thwart certification. To meet this situation, the Board has evolved the still unused *Sioux Lookout* remedy:¹⁶⁹ if withdrawals are induced by employer misconduct, it can set a date for determining employee sentiment prior to the date when the misconduct commenced and certify on the basis of a majority as of that date.

Where the union never gets a majority because of employer misconduct, the situation is much more difficult. The Code contains no provision for certification without majority support in such cases. The general remedial provisions of the Code are very broad indeed, but in light of the premium placed on employee free choice and the elaborate procedures spelled out in the Code dealing with numerical support for the union in the certification context, it is perhaps unlikely that the Board would certify a non-representative union without specific statutory authority.

In at least one of the cases—*199 Yonge Street*—in which the union was

¹⁶⁶ Since the time of writing the application of this new principle was dealt with for the first time in *Bank Canadian National* (1979), 35 di 39, [1980] 1 Can. L.R.B.R. 470, in which the union filed a complaint under s. 184 alleging, *inter alia*, that the employer committed an unfair labour practice by refusing to implement a new cash deficit policy in branches where applications for certification were outstanding. The majority of the board found that this conduct was "inherently destructive of important employee rights." (at 481). This test was adopted from *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26 at 33, 87 S. Ct. 1792 at 1797 (1967). Therefore, it was thought not necessary to prove anti-union *animus*. The Vice-Chairman dissented.

¹⁶⁷ See text accompanying notes 87-99, *supra*.

¹⁶⁸ See, e.g., *Tweed*, *supra* note 128.

¹⁶⁹ See text accompanying notes 100-08, *supra*.

successful in proving unfair labour practices at a branch where it did not have sufficient support for certification, the union sought broad and creative remedies. It asked for an order against the employer to cease and desist from interfering with the union's organizing campaign on a national scale and, in particular, from holding "captive audience" meetings, interrogating employees and disseminating anti-union literature in any of its branches. It also sought a public apology, an access order, organizational and exemplary damages and a certification order.¹⁷⁰

With the possible exception of the certification order, these remedies were all well within the jurisdiction of the Board to grant. Without examining them in any detail, however, the Board concluded that the case did not involve violations widespread, serious or recurrent enough to warrant such drastic remedies.¹⁷¹ Instead, it ordered the employer to furnish a copy of the decision to each of the employees in the branch involved. The net result of the decision was that, although the Board found that the employer's conduct had successfully aborted the union's organizing campaign at 199 Yonge Street, the only penalty that the employer sustained was the cost of photocopying and mailing the decision. The chances of the employees actually reading and comprehending its forty-one legal-size pages are not great. This is scarcely a deterrent! The remedy awarded in the *Kamloops* case was equally feeble: the employer was merely required to inform his employees at the Kamloops branch that they were entitled to wear union pins, and why, and to inform management that it is unlawful to prohibit the wearing of union pins.¹⁷²

The Board in both of these decisions was extremely solicitous of the corporate *amour propre* of the Commerce. Despite clear evidence of regional office involvement, the Board refused to find the existence of a corporate policy of unlawfully combating the union in its branches across the country. It did not wish to "humiliate" the Commerce by providing more global remedies.¹⁷³

This attitude to remedies is dangerously shortsighted. If a concerted, carefully orchestrated and skillfully managed anti-union campaign is in fact being waged in the banks, as it clearly is, the chances are good that it will be successful and that the employees' rights under the Code will be subverted. If the unfair labour practices by the Banks have to be litigated on a branch-by-branch basis, and if branch remedies are as inefficacious as those granted to date, there will be no deterrent as long as the banks start their campaigns early enough.

E. *Bargaining Problems*

Up to this point banking conduct during organizing campaigns has been considered, but it is a truism of labour relations that one of the best ways to

¹⁷⁰ *Supra* note 146, at 704-705 (di), 412-13 (Can. L.R.B.R.).

¹⁷¹ *Id.* at 705 (di), 413 (Can. L.R.B.R.).

¹⁷² *Supra* note 151, at 675 (di), 284 (Can. L.R.B.R.), 14,015 (C.L.L.C.).

¹⁷³ 199 *Yonge Street*, *supra* note 146, at 705 (di), 413 (Can. L.R.B.R.).

combat an organizing campaign is at the bargaining table. Bank conduct at already certified branches has been an extremely significant factor in retarding organization. Many branch employees have taken a "wait-and-see" attitude to unionization; they want to see concrete results before they disturb the *status quo*. Both union and management have been aware of this from the beginning and have conducted all their negotiations with more than an eye to the effect that they will have on the wider organizing effort.

One of the more contentious preliminary issues was that of the bargaining format. As indicated earlier, SORWUC initially attempted to bargain for its British Columbia units on a multi-branch, multi-bank basis. The banks, despite the considerable benefits that they would have obtained by bargaining on a joint basis, rejected this proposition out of hand; the union had been certified on a single branch basis and would have to bargain on the same basis. Manoeuvring over the bargaining format consumed valuable months of negotiating time. SORWUC served its original notice to bargain on three of the banks—the Commerce, the Bank of Montreal and the Bank of Nova Scotia—on September 26, 1977. No concrete proposals were actually tabled by the union until January, 1980.¹⁷⁴

A second and even more contentious issue that arose early in the bargaining relationship was the question of the legal status of the banks' across-the-board compensation increases. The effect of unionization on routine annual increases was an issue that had arisen very early in the organizing campaign, and both sides were acutely aware of its propaganda value. Bank spokesmen used the threat of a wage freeze for unionized employees in their attempts to discourage employees from seeking union representation. Employees had expressed enough concern about this possibility to prompt SORWUC to issue a widely-distributed leaflet in mid-1977 advising employees that such a wage freeze would be unlawful.¹⁷⁵ In late 1977, after a number of branches had been certified, but before bargaining was really under way, the Royal Bank and the Bank of Nova Scotia announced compensation increases for all of their non-unionized employees across Canada. The Royal offered to implement the same increase in the unionized branches if the union would agree to accept them as the total compensation increase under any collective agreement subsequently to be negotiated.¹⁷⁶ The union turned this down, although it offered its consent without prejudice to any further wage increases in the branches that it represented. In the Bank of Nova Scotia, the wage increases were simply implemented in the non-unionized branches and withheld in the unionized ones without any notification to the union.¹⁷⁷ SORWUC filed unfair labour practice charges under sections 184(1)(a), 3(a) and 3(e) of the Code against both banks.¹⁷⁸

¹⁷⁴ This history is outlined in *Royal Bank, Kamloops and Gibsons Branch* (1978), 27 di 701, [1978] 2 Can. L.R.B.R. 159, 78 C.L.L.C. ¶16,132. [Hereinafter *Gibsons #3*.]

¹⁷⁵ *Id.* at 705-706 (di), 163-64 (Can. L.R.B.R.), 440 (C.L.L.C.).

¹⁷⁶ *Id.* at 703 (di), 161 (Can. L.R.B.R.), 438 (C.L.L.C.).

¹⁷⁷ See *Bank of Nova Scotia, Vancouver Heights Branch* (1978) 28 di 901 at 902, [1978] 2 Can. L.R.B.R. 181 at 182. [Hereinafter *Vancouver Heights*.] Others of the "Big Five" also took this action.

¹⁷⁸ *Id.* at 904 (di), 183-84 (Can. L.R.B.R.).

These cases raise fundamental questions about the nature of the Canadian industrial relations system and the role of the law in regulating collective bargaining. The principle that lies behind much of the design of the collective bargaining system is that certification of a union equalizes bargaining power between employer and employees: individually employees are no match for an employer until they fully support their union.¹⁷⁹ This, of course, is nothing more than a pious hope. There is nothing in the nature of collective action that guarantees this result. The most that can be said about the fact of certification is that employees are stronger together than they are alone. They may still be weaker than the employer. Nevertheless, the myth of equality remains at the foundation of the system. As the policy-makers see it, there are winners and losers in specific situations, but, over the long run, the substantive fairness of the wage bargain is guaranteed by this balance of power. Therefore, the Labour Relations Board, in enforcing the law, is reluctant to intervene in the bargaining process:

The Board is not an instrument for resolving bargaining impasses. Proceedings before the Board are not a substitute for free collective bargaining and its concomitant aspect of economic struggle. Therefore, the Board should not judge the reasonableness of bargaining positions, unless they are clearly illegal, contrary to public policy, or an indicia, among others, of bad faith. Because collective bargaining is a give and take determined by threatened or exercised power, the Board must be careful not to interfere in the balance of power and not to restrict the exercise of power by the imposition of rules designed to require the parties to act gentlemanly or in a genteel fashion.¹⁸⁰

Only the most blinkered formalist could fall into the error of believing that certification made SORWUC the equal in economic clout of the Royal Bank or the Bank of Nova Scotia. Clearly these banks, with thousands of branches, hundreds of thousands of non-unionized employees and billions of dollars' worth of assets behind them, held the overwhelming edge. Yet, it is from the perspective of a need to preserve a balance of power, presumptively created by the magic wand of certification, that the Board initially approaches the problem posed by the wage freeze.

The Code at the time these cases were heard contained section 148(b),¹⁸¹ which froze the terms and conditions of employment after notice to bargain has been given.¹⁸² From the union perspective, since annual salary reviews

¹⁷⁹ See, for example, the preamble to the *Labor Management Relations Act*, 1947, 61 Stat. 137, [Hereinafter *Taft-Hartley*]:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. [Emphasis added.]

¹⁸⁰ *CKLW Radio Broadcasting Ltd.* (1977), 23 di 51 at 58-59, 77 C.L.L.C. ¶16,110 at 696.

¹⁸¹ *Canada Labour Code*, S.C. 1972, c. 18, s. 1 as am. by S.C. 1977-78, c. 27, s. 51.

¹⁸² It is necessary to obtain Ministerial consent before charging a violation of this section. *Canada Labour Code*, S.C. 1972, c. 18, s. 187(5).

were the norm in the banks, annual increases should be seen as one of the established conditions of employment which the employer could not alter after notice to bargain was given. It is arguable that the case was one that fell within section 148. The union charge was not, however, filed under that section. It was, as has already been indicated, filed under the general unfair labour practice provision, section 184. This legal strategy was partly dictated by technical requirements. With respect to some of the unionized branches, the increases had been withheld before any notice to bargain had been given. Furthermore, one of the employers' actions complained of was an increase in vacation benefits granted by the Bank of Nova Scotia. There was no pattern of improvement in vacation benefits and therefore no basis for arguing that withholding a generally-granted improvement was an alteration in terms and conditions of employment.

The union's decision to complain under section 184 rather than under section 148 was not simply a result of these fairly insignificant wrinkles in the fact situation: it had much broader implications. Section 148 focuses on the bargaining relationship between two parties, prohibiting certain specific conduct on a strict liability basis. The union's complaint, however, was that the banks' action, whether or not it fell within the limitations of the wage freeze provision, was an unfair labour practice because it was discriminatory and punitive against unionized employees. Even more significant, the complaint was that by singling out unionized employees in this way, the banks were discouraging their non-unionized employees from unionizing. Thus, the union was charging both bargaining and organizing violations.

The Board, however, was unable to see beyond section 148. Despite the fact that the procedural and substantive preconditions for section 148 had not been met, it devoted extensive discussion to the operation of that section. In fact, its decision can be summarized as follows: *if* this case had been governed by section 148, there would have been no breach of that section and therefore there can be no breach of the Code. Such elliptical reasoning invites careful examination.

There are two competing theories as to the meaning of wage freeze provisions like section 148. The first is the one adopted by other labour boards in Canada with similar statutory provisions.¹⁸³ In their view, "terms and conditions of employment" is a dynamic rather than a static concept; if annual increases, merit reviews or bonuses are the norm prior to a statutory freeze, then the employer must continue to implement them until the freeze is lifted. The second theory is that the freeze is static. If employees are making five dollars an hour when the freeze takes effect, they continue to work at that rate until it is over, even if the rate was due to be increased to six

¹⁸³ See e.g., *Spar Aerospace Products*, [1978] O.L.R.B. Rep. 859, [1979] 1 Can. L.R.B.R. 61, 78 C.L.L.C. ¶16,169 [hereinafter *Spar Aerospace*]; *Kiddies Togs Mfg. v. R. ex rel Deutch*, [1964] Que. S.C. 444, 3 C.L.L.C. ¶14,040; *Hospital Employees' Union, Loc. 180 v. Cranbrook and Dist. Hospital Soc.* (1968), 68 C.L.L.C. ¶14,145 (B.C.S.C.); see also, *NLRB v. Dothan Eagle*, 434 F.2d 93 (5th Cir. 1970); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962).

dollars an hour the next day. This view, although it has virtually no authoritative support in this country,¹⁸⁴ is the one espoused by the CLRB:

[S]ection 148(b) and its language is not to be interpreted by reference to contracts of employment or customs in effect prior to notice to bargain. By choosing union representation employees decide that they want to participate in the process of determining their conditions of employment. They participate by their union bargaining with the employer. The basis for bargaining is the situation obtaining when notice to bargain is given.¹⁸⁵

The CLRB finds that section 148 is intended to protect the union's exclusive right to bargain. To allow annual increases and merit increases, reasons the Board, is to allow individual bargaining.

This is surely too narrow a conception of the purpose of the freeze provision. It certainly functions to protect the union's status as bargaining agent, but it is redundant for that purpose, since the union's exclusive bargaining authority flows from its certification and not from its notice to bargain. It is an unfair labour practice to attempt to bargain with individual employees after a union has been certified, regardless of whether a notice to bargain has been given.

The most important function of section 148(b), and one that the Board ignores, is to protect the union's bargaining position by protecting the employees from being worse off under a collective bargaining regime than they were when they were unrepresented. If the *status quo ante* that is preserved leaves the employees in a worse position than before, which is the case if those terms of their individual contracts of employment providing for increases and bonuses are simply expunged, then the union's bargaining position is undermined right from the start.

In the bank cases under discussion, the withholding of the wage increase had precisely that effect. Instead of bargaining from a position in which the unionized and non-unionized employees were paid the same rates, the union was being asked to bargain from a position in which the unionized employees made *less* than the non-unionized employees. The floor for collective bargaining had suddenly been lowered. As the Ontario Board says, this cannot fail to have a "chilling effect . . . upon the representation of the employees by a trade union."¹⁸⁶

The approach adopted by the Ontario and other boards is not without its own difficulties. Pinning the *status quo* on the individual contract of employment, a legal fiction at best and a mockery of the very notion of contract at worst, has the potential to undermine the entire concept of a freeze. It is difficult to maintain that such a contract does not imply great latitude for the

¹⁸⁴ The CLRB in *Gibsons #3*, *supra* note 174, at 175, cites only *R. v. Canadian General Electric*, [1961] O.W.N. 117 (Co. Ct.), long since rejected by the Ontario Board, and two unreported decisions of the British Columbia Supreme Court (*Uniroyal*, 1966; and *University of British Columbia*, 1965) as authority for its position.

¹⁸⁵ *Gibsons #3*, *supra* note 174, at 722 (di), 176 (Can. L.R.B.R.), 449 (C.L.L.C.).

¹⁸⁶ *Spar Aerospace*, *supra* note 183, at 868 (O.L.R.B. Rep.), 68 (Can. L.R.B.R.), 713 (C.L.L.C.).

very kind of unilateral employer action that section 148 and its ilk are designed to prevent. The dynamic concept of "terms and conditions of employment" has been used to uphold layoffs¹⁸⁷ and changes in hours of work during the statutory freeze,¹⁸⁸ as well as wage and benefit increases *opposed* by the negotiating union.¹⁸⁹

Nevertheless, on balance, the dynamic concept is the preferable one. The CLRB interpretation, which protects only the right of the union to bargain, is a hard-line approach which completely fails to take account of the real inequalities in bargaining power. The Ontario interpretation, in providing some additional protection to the union's bargaining position, at least confronts the existence of such inequalities.

As for the real issue before it—whether or not there was a section 184 violation—the Board gave only the briefest consideration to the possibility. It finds that the employer, having complied with section 148, "acted properly and within its rights. . . ."¹⁹⁰ This is surely a dubious starting point. The Board was prepared to take a cursory look at the possibility that the mode of communication of the wage freeze might give rise to an inference of anti-union *animus*,¹⁹¹ but, not surprisingly, given its basic premise, it swiftly rejected it.

The impact of this decision was devastating. It is not over-dramatic to say that it struck the death-blow to SORWUC's organizing drive. SORWUC reports that its membership statistics showed immediate and catastrophic decline when the wage freeze was announced, followed by a decline equally catastrophic when the CLRB decisions in these cases were announced.¹⁹² Organizing by other unions as well lost what little momentum it had. Bank workers obviously felt that a wage increase in hand was worth more than the possibly nugatory improvements that unionization promised. In view of the progress of the negotiations to that point, that choice was a very rational one, if it had to be made.

Bank unions felt strongly enough about the issue to take the unusual step of raising it squarely before the CLRB again within the same year, when the "freeze" tactic was used again—this time with respect to a nine percent increase for 1979—and this time, in an unprecedented *volte face*, the Board saw things the union's way. The Board postponed the decision on the union's complaint from April 11, 1979 to November 30, 1979, but, when the deci-

¹⁸⁷ *Canadian General Electric*, [1965-66] O.L.R.B. Rep. 649.

¹⁸⁸ *Parr's Print and Litho Ltd.*, [1973] O.L.R.B. Rep. 597.

¹⁸⁹ *Scarborough Centenary Hospital*, [1969] O.L.R.B. Rep. 1049.

¹⁹⁰ *Gibsons #3*, *supra* note 174, at 723 (di), 177 (Can. L.R.B.R.), 450 (C.L.L.C.).

¹⁹¹ Memoranda circulated to non-unionized branches by the Bank of Nova Scotia announcing the improved wages and benefits contained the clear message that the improvements were not being granted to unionized employees. *Vancouver Heights*, *supra* note 177, at 903 (di), 182 (Can. L.R.B.R.).

¹⁹² SORWUC reports a high of about 430 members when the freeze was announced. This dropped to about 250 between the announcement of the freeze and the Board decision that the freeze was lawful, then dropped again to about 150 before SORWUC withdrew from negotiations. See *An Account to Settle*, *supra* note 27, at 107.

sion finally came down,¹⁹³ it found the Commerce¹⁹⁴ guilty of an unfair labour practice in withholding the increase from its unionized employees.

This is unquestionably the correct result, but its impact is reduced somewhat by the fact that the Board reached this result by a route that throws the whole area into some confusion. It virtually ignored its earlier decisions. There was certainly some basis for an early re-examination of the area. The recent Code amendments had reversed the burden of proof in section 184(3) complaints, and a new "freeze" provision had been introduced (section 124) prohibiting changes in terms and conditions of employment in the post-application, pre-bargaining period,¹⁹⁵ but neither of these amendments directly addressed the policy analysis on which the earlier decision was based—an analysis that the Board totally disregarded.

Furthermore, the principal basis for the finding of the unfair labour practice was not the "freeze" itself, but the method by which the Commerce chose to communicate the freeze to its employees. The Bank circulated a memo to *all* employees announcing the increase and pointing out that it applied *only* to non-unionized branches. Employees at unionized branches were required to initial the memo to ensure that they had seen it. The Board described this procedure as an attempt to intimidate both unionized and non-unionized employees—an attempt that was intended to have, and did have, a chilling effect on union organization.¹⁹⁶ The Board found this to be in breach of section 184(3).

The Board then considered whether or not the employer's conduct also breached section 124. This new section was applicable to only one of the bank branches under consideration, since it applies only to a particular time frame and the others were at a different stage of their relationship at the time that the complaint was made. The Board found the employer's conduct to be in violation of this section as well. It clearly adopted the "dynamic" view of the freeze which it rejected in the earlier case: "Basically, it is 'business as before'. Here, business as before was the granting of the nine percent general salary increase."¹⁹⁷

By implication, this overrules the earlier decision, but the Board did not clearly say so. In fact, it deliberately refrained from considering the effect of section 148, the post-notice-to-bargain "freeze" provision discussed in the earlier decision.¹⁹⁸

As a result, absent a mode of communication that is, in itself, an unfair

¹⁹³ *CIBC*, *supra* note 152.

¹⁹⁴ Complaints were also filed against the Royal Bank and the Bank of Montreal. The Board heard the Commerce complaint first, with the other two banks agreeing to be bound by the decision insofar as it was applicable to their conduct.

¹⁹⁵ Section 124 actually applies from the time the application for certification is made until the application is withdrawn or dismissed, or, if the union is certified, until thirty days after the certificate is issued. *Canada Labour Code*, S.C. 1977-78 c. 18, s. 44.

¹⁹⁶ *CIBC*, *supra* note 152, at 23.

¹⁹⁷ *Id.* at 34.

¹⁹⁸ *Id.* at 39.

labour practice, the case is a precedent only for "freezes" that are implemented after application for certification and before notice to bargain is given. A "freeze" at any other time may be just as devastating to union organization, no matter how it is communicated, but it is still an open question whether it would be unlawful. Because the Board failed to clarify its position on section 148, the question may have to be re-litigated still further.¹⁹⁹

The banks have a legitimate grievance against the Board as well. The Board gave its blessing to their 1978 wage freeze and they conducted themselves accordingly for 1979. In this latest decision, the Board not only betrayed this reliance, but also added insult to injury by awarding the amount of the 1978 increase as well as the 1979 increase to unionized employees in order to bring their wages fully into line with those of the non-unionized employees.²⁰⁰

The decision is, however, of enormous significance at least to this extent: the Board was finally prepared to recognize, at least on the part of the Commerce, a concerted corporate anti-union policy: "It has become apparent throughout the organizational attempts at various branches of the employer across the country, by several unions, that this employer has embarked on a campaign designed to discourage its employees from exercising their rights under the Code."²⁰¹ From this altered perspective, it should be more sensitive to union unfair labour practice charges and perhaps more creative in fashioning remedies.

F. Results of Bargaining

Although the total number of current branch certifications now stands at seventy-three,²⁰² the process of bargaining has been very slow, and many of these units have not yet signed first contracts. In October, 1978, CUBE members ratified the first collective agreements negotiated with the chartered banks. These contracts are unremarkable. They contained Rand-formula union security clauses, but, in terms of wages and benefits, unionized employees got no more than had been given to all non-unionized employees earlier in the year.²⁰³ Other unions have found the banks equally unwilling to agree to substantial concessions in collective bargaining; all the contracts that have been signed provide for wage increases similar to those already given to non-unionized employees.

¹⁹⁹ Since the time of writing, the Board has indeed clarified its position, although the clarification can scarcely be said to contribute to the intellectual consistency of the Board's handling of "freeze" problems. In *Bank of British Columbia* (unreported decision, Board File: 556-7) the Board makes the entirely unexpected announcement that it does indeed intend to apply different "freeze" concepts depending on whether the "post application freeze" (s. 124), or the "post notice-to-bargain freeze" (s. 148) is involved. With respect to s. 148, the Board continues to adhere to the "static freeze" concept outlined in earlier decisions, while with respect to s. 124, the "dynamic freeze" concept will continue to apply. In taking this position, the Canada Labour Relations Board is unique in North America.

²⁰⁰ *Id.* at 38.

²⁰¹ *Id.* at 19.

²⁰² See note 124.

²⁰³ The CUBE negotiations are discussed in *Ontario Labour*, *supra* note 24, at 8-9.

The reasons for the banks' tough bargaining stance seem clear. The unions want contracts that they can use as bargaining tools. They need to show other bank workers that they can make gains through collective bargaining that can be achieved in no other way. The banks, on the other hand, want to convey the message to their employees that they will gain nothing by unionizing. Very early on they made it clear that any gains achieved by unionized branches would be extended to non-unionized branches as well.²⁰⁴ As the contracts show, the banks have the bargaining power.

Most unions signed contracts, despite the unfavourable terms. An alternative response to the inequality of bargaining power is to be found in the bargaining history of SORWUC which, like every other activity of that union, warrants consideration in particular detail. SORWUC, as discussed earlier, initially attempted to bargain a master contract for its British Columbia units. The banks refused. This battle over bargaining format was one that only the banks could win. Legally, they were on unimpeachable ground in insisting on their right to bargain only for individual bargaining units, but this bank position was an assault on SORWUC at its most vulnerable point. It simply did not have the financial resources or staff to bargain for twenty-six individual branches and still keep on organizing.

While this manoeuvring over format was going on, the banks initiated their nation-wide compensation increase for non-unionized employees. In such an atmosphere, collective bargaining did not flourish and negotiations continued to drag on.²⁰⁵ SORWUC took successful strike votes at three of its Commerce branches, and observers of bank organizing waited for the next crisis.

It came, but not in the form of a strike. In the first week of August, 1978, SORWUC informed the country that it was withdrawing from bank negotiations. Shortly thereafter, the union requested that the CLRB cancel its certifications for twenty-four out of its twenty-six units, a move unparalleled in Canadian labour history.²⁰⁶

SORWUC offered the following justification for its conduct. Its only weapon in the fight to secure a creditable contract was the strike, but it had grave reservations about attempting to strike. To use the Commerce example, SORWUC had certifications for a total of six out of 1,824 Commerce branches across the country. Turnover had taken its toll, and at only three of these—the three at which the strike vote had been taken—did the union still have majority support. It was unlikely that a strike alone would shut down even the struck branches, let alone put the national institution to any

²⁰⁴ See *Burns-Fry Study*, *supra* note 17, at 3.

²⁰⁵ Another obstacle to bargaining was the fact that the banks had appealed many of the Board's decisions to the Federal Court and had asked the Board to review others. Although they did not refuse to bargain, they took the position that the whole issue of bank unionization was still up in the air.

²⁰⁶ As a procedural matter, these units were not decertified under s. 137 of the *Canada Labour Code*, S.C. 1972, c. 18, s. 1, since many of them had not been certified for the requisite year; instead the certifications were rescinded under s. 119 of the Code, the Board's general power to review and rescind any decision.

serious inconvenience. Any strike strategy had always revolved around a province-wide boycott tactic. With both financial and moral support from CLC unions dwindling as a result of the head office conduct,²⁰⁷ the prospect of a successful boycott was remote. Furthermore, the union doubted its ability, given its small staff, membership and financial resources, to counter a strong anti-strike, anti-boycott campaign. It particularly feared the reactions of non-unionized bank workers who might be put out of work by a successful boycott. Finally, the union was in very serious financial difficulty and simply could not continue to bargain on the banks' terms. Negotiations had been effectively stalled since it became evident that the banks were firm in refusing to offer more for 1978 than they had already given their non-unionized employees. SORWUC, for both ideological and practical reasons, was unwilling to sign the kind of contract that CUBE and the other unions eventually signed.

The dilemma is a real one for trade unionists. A poor first contract can be almost as great a defeat as no contract, especially when organization has not penetrated very far into the sector. The paradox is that, in order to gain support for the union, it is necessary to show results; a first contract is an organizing tool in a situation like this. In order to get results, however, it is necessary to have bargaining power, which is very difficult to muster in a thinly unionized sector.

SORWUC's action was greeted with consternation by trade unionists across the country. The union was accused of abandoning its bank workers. The ultimate wisdom of SORWUC's decision must, however, be assessed against the future course of bank organizing in Canada, and the returns are not yet in. SORWUC itself is down but not out. It has now withdrawn from all its certified units, including the two in Saskatchewan, but, as discussed earlier, it contemplates resuming organizing at some future date on some basis other than branch-by-branch. The response of bank workers at that time will be the best indicator of whether SORWUC's withdrawal should be seen as a betrayal or as a strategic retreat.

IV. CONCLUSIONS

The purpose of this study is to examine the role played by the law in organizing and collective bargaining in a sector of the economy that has historically been unorganized. Does the law promote unionization and collective bargaining in such a sector? If it does not, or does not do so adequately, to what extent can it be made a more effective instrument for that purpose?²⁰⁸

Labour relations legislation in Canada was not originally conceived to play a promotional role in the spread of trade unionism and collective bargaining. The statute that set the pattern for modern trade union legislation in Canada was the federal *The Industrial Relations and Disputes Investiga-*

²⁰⁷ See text accompanying notes 119-23, *supra*.

²⁰⁸ The assumption here is that collective bargaining is a practice worth promoting. See *Canadian Industrial Relations: Report of Task Force on Labour Relations* (Ottawa, 1968). [Hereinafter *Woods Report*.]

*tion Act*²⁰⁹ of 1948, a marriage between the American *National Labor Relations Act*,²¹⁰ and earlier Canadian legislation creating dispute settlement mechanisms for industrial unrest.²¹¹ There is still a great deal of debate about the primary purposes of the *Wagner Act*. The "New Deal" political climate out of which it arose was one in which social-democratic reformers allied with doctrinaire laissez-faire capitalists to save America from political and economic collapse. This bastard origin suggests mixed motives: reduction in industrial warfare with its deleterious effects on productivity, equalization of bargaining power, and promotion of collective decision-making and "industrial democracy."²¹² The *Wagner Act*, potentially at least, serves all these goals, and it is difficult, and perhaps not particularly fruitful, to identify which was the most important in the eyes of its architects. The Canadian legislation, however, differed considerably from the *Wagner Act*. To highlight just a few of the significant differences, *The Industrial Relations and Disputes Investigation Act* provided for complicated procedures for conciliation and postponement of strikes during or after negotiations for a collective agreement, outlawed strikes at any other time, and mandated grievance settlement procedures.²¹³ These differences suggest that Canadian policy-makers had their eyes on one goal above all others: the promotion of industrial peace.²¹⁴

To promote industrial peace, it is not necessary to promote collective bargaining as a positive good for all workers. It is necessary only to legitimize it, and mandate it as a safety valve for such industrial unrest as was spontaneously generated by social and economic forces. Thus, those workers who "chose" to organize could bring that *fait accompli* before a passive state agency which would bless their efforts and send them forth to battle. Only now their battle would have to be fought with a much more restricted set of weapons than before. The law was certainly never designed or intended to evangelize collective bargaining or to generate conflict where workers were quiescent under the regime of unilateral employer action. That role belonged to the labour movement. The state defined its own role as neutral arbiter of the class struggle.

²⁰⁹ S.C. 1948, c. 54. This act was modelled very closely on Wartime Labour Relations Regulations, Can. War Orders and Regs., P.C. 1003, which, by virtue of the federal emergency power, applied throughout the country.

²¹⁰ *National Labor Relations Act of 1935*, c. 372, 61 Stat. 135 (1935). [Hereinafter *Wagner Act*.]

²¹¹ The history of these legislative developments is outlined in Woods, *Labour Policy in Canada* (2d ed. New York, MacMillan, 1973) especially chapters II and III.

²¹² The purposes behind the *Wagner Act* are discussed in Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941" (1978), 62 Minn. L.R. 265 at 281-5.

²¹³ *The Industrial Relations and Disputes Investigation Act*, S.C. 1948, c. 54, ss. 16, 17, 19, 21-38.

²¹⁴ Cf. Woods, "The Course of Labour Policy in Canada" in *The Direction of Labour Policy in Canada*, ed. Bairstow (Montreal: McGill University, 1977) at 5, where the author discerns "the old Canadian preoccupation with industrial peace" in these provisions.

The trade union movement thrived within this format for a number of years. From a pre-war low of fifteen percent, union membership climbed to about twenty-five percent of the non-agricultural work force in 1946 under the influence of the war-time regulations similar to the 1948 Act, and by 1952 it was thirty percent, by which time legislation on the federal model had spread to most of the provinces. There, however, it levelled off. The figure hovered around thirty percent for twenty years, and it even dropped back to twenty-six percent in the early 1960's.²¹⁵

By the mid-1960's it was clear that a new approach was needed to make collective bargaining more accessible to the vast numbers of unorganized workers. The Woods' Task Force, established by the federal government to examine labour policy, identified the limited coverage of trade unionism and collective bargaining as an area of concern,²¹⁶ and recommended a more positive legislative stance which would open the system to more of the unorganized.²¹⁷ This new policy is reflected in the 1972 amendments to Part V of the Code.²¹⁸ Organization rights were extended to certain groups of employees who had hitherto been excluded from coverage under the Code.²¹⁹ A preamble was enacted containing a positive commitment to the values of collective bargaining.²²⁰

This commitment to promoting and encouraging collective bargaining as the desirable method of establishing terms and conditions of employment and settling disputes is potentially revolutionary in its implications. Unfortunately, it is grafted onto a statute that basically maintains the old "state as neutral arbiter" approach to labour relations. The labour board retains its passive role, waiting to be approached by employees who have "chosen" unionization. Admittedly more employees are now allowed to make that choice within the scope of the Code, but there are few provisions to attract those millions of workers who could always have made the choice but who failed to do so.²²¹ The preamble commits Canada to the promotion of collective bargaining, but the Code provides no readily apparent mechanisms for carrying out the task in those sectors of the economy that, historically, have been unorganized.

The historic inability of the trade union movement to penetrate sectors like finance, insurance and retail trade suggests that there are special problems facing unions in these sectors. On the basis of this study, it is possible to generalize usefully only about the financial sector, and in particular the

²¹⁵ See *Labour Organizations in Canada, 1976-1977*, Table 1, *supra* note 1 and *Labour Organizations in Canada, 1978*, Table 1, *supra* note 1.

²¹⁶ *Woods Report*, *supra* note 208, at 85-90.

²¹⁷ *Id.* at 138-40.

²¹⁸ S.C. 1972, c. 18, s. 1.

²¹⁹ In particular, "dependent contractors" was included in the definition of "employee" in s. 107(1) of the *Canada Labour Code*, S.C. 1972, c. 18, s. 1.

²²⁰ *Supra* note 55.

²²¹ One exception to this is the reduction in the membership percentage needed by a union in order to get a vote from 50% to 35%.

chartered banks. Yet many of the same conditions prevail in insurance and retail trade; it is suggested that the problems are similar in all three sectors.

The chartered banks of Canada are an oligopoly. The industry is highly regulated, entry is difficult, and although the rise of "near-banks" in recent years has put some competitive pressure on the chartered banks as a group, there is little scope for substantial inter-bank competition. Both the regulation and the oligopolistic conditions have resulted in inter- and intra-bank working conditions that are very close to uniform.

The fact that bank work is generally done through small, relatively self-contained units has two consequences for labour relations. First of all, the small size usually promotes close working and personal relationships with supervisors and management—a traditionally inhibiting factor in unionization.²²² Second, the large number of units makes initial organizing costs astronomical for unions, and prevents economies of scale in administering collective agreements.²²³ This means that unions on tight budgets will think twice about entering the banking sector, since it will undoubtedly have to be subsidized for a long time to come by other dues-paying members in more union-efficient sectors.

Furthermore, these small bank branches are part of an enormous, centrally administered bureaucratic structure. Although this kind of structure can generate worker alienation, which, to some extent, counter-balances the anti-unionization effects of smallness, it poses an additional problem. The potential for the adoption of bank-wide personnel policies, which isolate unionized branches and which make unionization appear unattractive to non-unionized branches, is enormous. Likewise, the opportunities for unit manipulation and promotion and transfer policies which appear punitive to employees and, therefore, inhibit unionization are multiplied when such actions can be buried in corporate paper and made to appear part of general business policies.

An additional feature of bank labour relations is the large percentage of women employees. Historically women have been less permanently attached to the work force than men. It has yet to be demonstrated that this makes them any less attracted to the principles of trade unionism than male workers, but it does have two consequences. First of all, women had, and still have, a much higher turnover rate than men. Particularly in small units,²²⁴ the turnover problem necessitates constant attention to organizing and keeping the troops together. This, of course, increases administrative costs for unions. Second, male-dominated unions that share the prejudices of society in general believe that women are less militant, less aggressive, less likely to be aggrieved by arbitrary conduct than men and, therefore, less

²²² See Bain, *The Growth of White-Collar Unionism* (Oxford, Clarendon Press, 1970) at 72 ff.

²²³ *Id.*

²²⁴ In larger units turnover due to inter-branch transfer would not be such a problem because transferees would probably stay within the same unit. Because of the turnover problem, units in Quebec have made the union shop a strike issue. Six units in the Royal Bank in the Saguenay District struck over this issue in September, 1979, and at the time of writing were still out.

likely to be attracted to trade unionism. Bank clerical workers are not in competition with male-dominated employment sectors, and therefore their low wages are not seen as a threat to "union" working conditions. The concentration of women in banks has inhibited trade unionism because the trade unions themselves have tended to turn their backs on "female job ghettos."

Historically, dissatisfied bank employees have escaped the system, as evidenced by the high turnover rate, rather than fought. When they do organize in small units, they are isolated by the bank bureaucracy. The sheer scale of the bank operation, as well as its centralized control, means that head office, with a great deal at stake in keeping the unions out, can get its message across to the employees much earlier, more often, and more effectively than the unions can, either by improved terms and conditions of employment, by verbal or written propaganda, or more subtle forms of economic terrorism.

None of this is intended to suggest that the banks are "rogue employers." They have fought the current organizing campaign with vigour but they have probably done no more, and perhaps less, than any other well-organized, well-advised, well-heeled cartel of businessmen would have done in like circumstances and with as much at stake. They have not always stayed inside the law and have certainly stretched the law to its utmost. The fundamental obstacle to bank organization is not that the banks are unregenerate lawbreakers; it is that the structure and nature of the industry inhibits collective action and resists traditional organizing by established trade unions, as well as providing great opportunities for the banks to discourage unionism without breaking the law. These problems are only exacerbated by the unfair labour practices and the opportunities presented by the bureaucracy to obscure matters for the labour board.

In order for unionization and collective bargaining to prosper within the "state as neutral arbiter" or "adversary" system, there must, in general, be three preconditions: (1) there must be few obstacles, either structural or psychological, to collective action by employees, (2) the work situation must be such as to attract trade unions or at least make them receptive to approaches from employees, and (3) employer interference of any kind must be identifiable and controllable. Obviously, these conditions did not exist historically in all industries that have been unionized, but the degree to which they did subsist contributed directly to the speed and extent to which unionism spread in those industries. It is equally obvious that none of them subsists in the banking industry. A system in which the state waits for the workers to act is very poorly designed to promote the goal of unionization of banks.

Neither the Board nor Parliament has been blind to the special problems posed for those unorganized sectors exemplified in this study by the banks. The Board has attempted to tailor its responses in bank cases to the special needs of the industry. Parliament amended the Code again in 1978 to strengthen adversary mechanisms to deal with some of these special problems. To what extent have they been successful?

The most significant of the Board responses is, of course, the decision that the individual branch is a unit appropriate for collective bargaining. The branch unit is, as was recognized at the time and as subsequent history has

demonstrated, less than ideal. The decision may have created as many problems on the bargaining level as it solved on the organizing level. As was argued above, successful organizing is so intimately linked to successful bargaining in this sector that, at this stage, it would be misleading to suggest that the unit decision solved the organizing problem for bank workers. Nevertheless, the earlier *Kitimat* decision,²²⁵ rejecting branch unionism, had excluded bank workers from access to collective bargaining almost as effectively as a statutory exemption; the *Victory Square* decision²²⁶ "repealed" that exemption and opened the legal certification mechanism to bank workers *if* they could overcome the other obstacles to its use.

One of these obstacles, it is suggested, is the fact that the structure of banking provides opportunities for the employers to cover their tracks in the commission of unfair labour practices more easily than traditional industrial employers. Both Parliament and the Board have attempted to assist unions with the problems of proof in unfair labour practice cases.

The most obvious of these attempts is the shifting of the burden of proof to the employer in unfair labour practice cases dealing with anti-union discipline or discrimination. This provision was long overdue. It simply recognizes the fact that the employer is the party in possession of the facts that would prove or disprove this kind of charge.

A "judicial" alteration in the unfair labour practice provisions that is of great potential significance is the doctrine announced by the Board in the *Kamloops* case:²²⁷ that anti-union *animus* is no longer an absolute requirement of an unfair labour practice.²²⁸ This should expand the range of employer conduct against which the union may effectively seek a remedy.

The other legislative amendment in the most recent package directed at employer unfair labour practices is the *CKOY* amendment making the date of application for certification the relevant date for determining whether or not employees wish to be represented by a union.²²⁹ The concept behind provisions like this is that it is impossible and counter-productive to administer a labour relations system by constantly policing the conduct of the parties. The statutory goals can be better served by designing the system in such a way that misconduct is futile. Thus, the *CKOY* amendment simply eliminates the traditional union problem of proving employer misconduct between the time of application and hearing, and proving that such misconduct affected the free expression of employee wishes, by providing that, whatever effect the misconduct may have had on the employees, it can have no effect on the fate of the certification application.

Although, the importance of this provision should not be minimized, it goes a very short distance towards solving the problem of employer influence. Many of the loopholes have already been identified. The employer can simply

²²⁵ *Supra* note 18.

²²⁶ *Supra* note 37.

²²⁷ See text accompanying notes 161-68, *supra*.

²²⁸ *Supra* note 151.

²²⁹ See text accompanying notes 97 ff., *supra*.

start his coercive tactics earlier; if he is successful no application will ever be made. With unlimited access to employees, an extremely "well-oiled" inter-branch communications network and a loyal management staff, he has ample opportunity to do this. Furthermore, the *CKOY* amendment does not help the union in the case of a vote.

Changes like these are all subject to the fundamental limitations of the "state as neutral arbiter" or "adversary" model. Their effectiveness rests on the assumption that problems will be brought before the Board by the parties, that the parties are basically prepared to live within the system and need only an occasional admonition to remind them of their obligations, and that the remedies limited to the parties will effect the statutory goals. The lesson of the unorganized sectors is that none of these assumptions is necessarily valid. If collective bargaining is to thrive in these sectors, the state must take a much more active promotional role. It must reach out and forestall the development of labour relations problems, which by their very nature, would never come under the scrutiny of the Board through the adversary system. It must actively supervise employer conduct throughout the enterprise that may affect the exercise of employees' organizational rights. It may even be necessary for it to create organizational impetus where conditions are such that it will not be generated in any other way. It must go beyond playing a passive role within the adversary system.

A first step in this direction would be the recognition that employers have no legitimate role to play in the certification process. This is not a revolutionary leap for Canadian policy-makers. Already we have recognized that the question of whether or not employees wish to unionize is a matter to be determined by the exercise of their free choice. By certifying unions on the basis of membership cards rather than representation votes, we deny the employer the right to "campaign" for the loyalty of his employees, a right that is held so sacred in the United States.²³⁰

We have, however, hesitated to extend this principle to its logical conclusion. We are still prepared to allow the employer a wide latitude of "free speech." In the United States, of course, "free speech" has constitutional dimensions, and the *Taft-Hartley Act* has an explicit provision protecting "employer free speech."²³¹ Whereas some Canadian provincial labour statutes contain similar provisions,²³² the Code does not. But the CLRB has chosen

²³⁰ See, e.g., Getman et al., *Union Representation Elections: Law and Reality* (New York, Russell Gage Foundation, 1976) at 136: "The interest in encouraging peaceful acceptance of employee choice is furthered if employers are given an opportunity to campaign before employees make their final decision. The campaign may not affect that decision, but the democratic principle of equality of opportunity to persuade supports the argument that it should take place."

²³¹ §8(c), 61 Stat. 142 (1947).

²³² See, e.g., *The Labour Relations Act*, R.S.O. 1970, c. 232, s. 56: "nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

to read a right to "free speech" into the Code.²³³ This latitude is not a necessary implication of the statutory provisions of the Code. Boards have recognized that, because of the employer's control over employees' economic welfare, any involvement by him, positive or negative, in representational issues tends to influence the employee's free choice. They have also recognized that the employer's unlimited access to employees during working hours gives him an overwhelming advantage in getting his message, whatever it may be, across to his employees. They have, therefore, been prepared to subject employer conduct to strict scrutiny to see if it is coercive. Strict scrutiny, however, may not be enough. Employer involvement of any kind, whether it consists of the distribution of anti-union literature, the holding of "informational" meetings, or even the dissemination of information about existing, or new, employment conditions, serves no useful industrial relations purpose. If it is felt that employees need a source of information to counter-balance the union, informational services could be administered by the Board. Employer involvement is inherently coercive. What is needed is a rule prohibiting any stance by an employer other than absolute non-involvement in any union's attempts to organize his employees.

Further, a rule may not be enough; its effective implementation would require that the labour board take a much more active, visitorial role in supervising employer conduct in the workplace. As has already been pointed out, the most insidious and most successful cases of employer interference are those which by their very nature are never brought before the labour board. The Board should not wait for these problems to surface; it should seek them out. This could be done through the more extensive use of labour relations officers deployed by the Board, *suo motu* if necessary, to troubled industries.

A useful adjunct to closer supervision of employer conduct would be Board initiation of organization at the bargaining unit level. If the state views collective bargaining as the best method of establishing terms and conditions of employment, it should not be afraid to say so to individual employees, and to lend its prestige to the trade union movement as a counter-balance to the economic power of the employer. It is not suggested that the Board's employees should actually do the organizing; this would cast the Board in the undesirable role of playing favourites among unions. Nonetheless, it should certainly take on more extensive educational functions in advising employees of their rights, of the advantages of collective bargaining, and of possible avenues for securing union representation.

Closer supervision of employer conduct will help to identify problems, but the question of remedies remains. A system that relied totally upon rooting out and solving labour relations problems individually would be administratively unworkable as well as prohibitively expensive. Rather, remedies that deter improper conduct are a very important element in any workable system.

The Board's traditional remedies are tied very closely to the adversarial

²³³ *Selkirk*, *supra* note 124, at 698-99 (di), 551 (Can. L.R.B.R.). See also text accompanying notes 124 ff, *supra*.

model. Back pay and reinstatement are based on traditional contract theory and are designed to return individual employees to the position in which they would have been had the violation not occurred. "Cease and desist" orders follow the injunctive model and are designed to bring the parties' conduct back into line with the law.

We have had, as yet, no real experience with the "rogue employer" in Canada, but the J. P. Stevens cases in the United States demonstrate the futility of such remedies where a largely unorganized employer is determined to stay that way. The problem is that they have virtually no deterrent effect. An employer who is forced to reinstate unlawfully discharged employees and pay them back wages is very little worse off than if they had never fired them. Discharged employees continue to serve the admonitory function of warning other employees of the consequences of getting involved with unions even if they are subsequently vindicated. Back wages are a small price for the employer to pay.

"Cease and desist" orders likewise serve only to reinstitute a regime of "law and order" as of the date on which the order was issued. The employer is simply required to do what he should have been doing all along. This may mean very little if his unlawful conduct has already had its effect. It almost always pays, from the employer's point of view, to take a chance: even if his conduct is subsequently found unlawful, he will usually come out ahead on the balance sheet.²³⁴

To date, the banks have largely escaped even these mild penalties for their misconduct. There have been very few discharge cases, and in those that the union won the employees had already secured alternative employment and did not wish reinstatement.²³⁵ Even the "cease and desist" order has not been used extensively, since the Board has been unwilling to conclude that a pattern of unfair labour practices exists so as to make such an order appropriate. In its most recent "freeze" decision, the Board was forced to recognize a corporate policy of anti-unionism, at least at the Commerce.²³⁶ In the face of such a policy, it will be searching for effective remedies. With over 7,500 bank branches in the country, it will be impossible to deal with employer misconduct on a branch-by-branch basis.

In order to counteract the employers' anti-union campaign in a way that will make organizational rights real for bank workers, it may be necessary to award remedies in those cases that *do* surface so as to effectively deter misconduct throughout the system. Two remedies that could have that effect are certification without a majority and organizational damages, both of which were sought in the *199 Yonge Street* case.²³⁷

Certification without a majority²³⁸ is merely an extension of the prin-

²³⁴ See Kovach, "J.P. Stevens and the Struggle for Union Organization" (1978), 29 Lab. L.J. 300 at 308.

²³⁵ See *199 Yonge Street*, *supra* note 147.

²³⁶ *CIBC*, *supra* note 152, at 19-20.

²³⁷ *Supra* note 146.

²³⁸ See text accompanying notes 106 ff, *supra*.

ciple embodied in the *CKOY* amendment, that the system should be designed, insofar as is possible, to render unlawful or undesirable conduct futile. The *CKOY* amendment makes misconduct futile after the application for certification has been made. Certification without a majority attempts to make it futile at any time after an organizational campaign has begun. Obviously, it is not a remedy to be used lightly because of its effect on the employees' free choice. Nevertheless, there are situations in which the possible interference with employees' free choice may be less obnoxious than the possibility that employer misconduct will successfully deprive employees of the right to collective bargaining.

Certification without majority does not always lead to healthy bargaining relationships in those provinces where it has been adopted, but this may not be sufficient reason to abandon it.²³⁹ Its primary function is as a deterrent: if the employer knows that misconduct will not relieve him of the obligation to bargain, he will be less likely to engage in it, and the union's chances of securing majority support will be improved. It is a remedy that Parliament should speedily incorporate into the Code.

Organizational damages are in the experimental stage in both the United States and Canada,²⁴⁰ and there is, as yet, no empirical evidence on their deterrent effect. Common sense suggests, however, that an employer will hesitate to engage in misconduct that puts him at risk of having to pay the costs of the union's organizational campaign. They would constitute an additional entry on the debit side of the balance sheet, and along with more traditional remedies they may swing the balance against unlawful conduct. Furthermore, organizational damages would ensure that the union survives. For a union like SORWUC, such damages could mean the difference between victory and capitulation. For more established unions, such awards can increase the cost-efficiency of organizing sectors like banking to the point where it becomes economically feasible.

Remedies like these ideally percolate down the system by convincing the employer that it is useless and expensive to fight. They are still bound, however, by the adversary model in that their direct impact bears only on the bargaining units that have come before the Board. In the banking world that may not be sufficient. The Board may have to make the quantum leap of awarding remedies that directly affect more than the bargaining unit before it. The Board's statutory basis for making broad remedial orders is unquestionable. The only limitations on its power to make orders extending beyond

²³⁹ A survey of bargaining relationships conducted by the Research Branch of the Ministry of Labour and covering the years 1970-79 discloses that in this time period there were 21 certificates issued in cases where the union did not have majority support. Of these, 14 led to first agreements and 7 did not. No data is available on whether second and subsequent agreements have been reached.

²⁴⁰ Two Canadian labour boards have made awards of organizational damages. See *Kidd Bros. Produce Ltd.*, [1976] 2 Can. L.R.B.R. 304 (B.C.); *Academy of Medicine*, [1978] 1 Can. L.R.B.R. 183 (Ont.); See also *Radio Shack*, [1979] O.L.R.B. Rep. 1220, [1980] 1 Can. L.R.B.R. 99, 80 C.L.L.C. ¶16,003 where the Ontario Labour Relations Board awarded "bargaining" damages in a case of extreme bad faith bargaining.

the boundaries of particular bargaining units would be the natural justice requirement that no order be made against a party who has not had notice and a hearing. There is nothing to prevent it, in a certification hearing involving a specific branch of the Commerce, for example, from making an order affecting all branches of that bank.

Such an order was sought in both *199 Yonge Street*²⁴¹ and *Kamloops*.²⁴² For reasons already discussed, the Board turned it down, but such requests will arise again, and it is possible that such orders are not only appropriate but necessary to deal with the bank situation.

The approach suggested here for the certification process would require the state explicitly to "take sides" and make good on its commitment to the promotion of the values of collective bargaining. It would completely abandon the model of the certification process as a battle between the union and the employer for the hearts and minds of the employees in favour of a model in which the employer is relegated to the sidelines and the state actively assists the trade union movement in unionizing employees. This approach would go a long way towards overcoming the obstacles to unionization in the banks.

Two very important problems would, however, remain. One is that increased state supervision of the certification process would finesse the problem of union indifference to, or economic inability to cope with, the unorganized sectors by usurping some of the historic functions of the trade unions. If the unions can do the job, this should not be necessary, yet the unions do not appear to be able to do the job. The CLC has been grandiloquent against the iniquities of the banks, but in the almost three years since the *Victory Square* decision only twenty-nine units²⁴³ have been organized under its aegis. Its much-vaunted million-dollar organizing campaign appears to be moribund and the BWOC and its satellite, the Union of Bank Employees, appear to be going the way of ACTE before them. Individual CLC unions have done little better, and it is clear that they have neither the will nor the resources to organize the entire system.

SORWUC, operating outside the mainstream of the Canadian trade union movement, appears to be uniquely possessed of the drive and commitment necessary to organize and make the adversary system work for bank workers. Paradoxically, however, SORWUC's ideological perspective, the source of its uniqueness, has made it virtually incapable of operating within the system. It was unable to make the compromises necessary to achieve a contract. It could not work incrementally, preferring to throw away its small victory and start over on a grander scale when it was unable to make revolutionary gains in its first round of contract negotiations. SORWUC made extravagant promises to its members—promises that it could not hope to fulfil within

²⁴¹ *Supra* note 146.

²⁴² *Supra* note 151.

²⁴³ See note 123. The Steelworkers units were organized under the umbrella of the BWOC, as well as the UBE units.

the system.²⁴⁴ Whether in its province-wide assault SORWUC will set itself more modest goals remains to be seen.

The second problem revolves around the fact that the organizational process is only the first step in implementing the real policy goal: participation by workers in determining the conditions under which they will work. The means to that end which our society has chosen is collective bargaining. It is certainly possible to eliminate the adversary process at the certification stage, when employees are choosing how they are going to deal with their employer, but it is a contradiction in terms to eliminate the adversary process in collective bargaining. This poses a real difficulty when the employer's conduct at the bargaining table has at least as great an impact in retarding the spread of collective bargaining in the industry as does his anti-union propaganda and other attempts to influence employee free choice.

As was pointed out earlier, labour boards and legislatures are extremely sensitive to the fact that state involvement in bargaining conduct interferes with the free flow of economic forces which our society has determined to be the best determinant of bargaining outcomes. As the sides have lined up so far in the bank cases, the "free flow of economic forces" has resulted in such an overwhelming concentration of power on the side of the employers that unionized employees are scarcely better off than when they were bargaining individually. That balance may shift somewhat as unionization spreads throughout the industry, and, if the suggestions outlined above for changes in the certification process are adopted, the shift might come faster. Meanwhile, union weakness at the bargaining table is a deterrent to increased unionization.

The Labour Board could be of much more assistance to bank unions without abandoning the free collective bargaining system, simply by being much more sensitive in unfair labour practice cases to the fact that its decisions affect the balance of bargaining power. Moreover, perhaps more radical solutions to bargaining inequality may be desirable. An avenue worth exploring as a solution to bargaining weakness is first contract arbitration. This remedy, which allows the Board to impose a first contract in certain situations, was added to the Code in 1978,²⁴⁵ and has yet to be tested in the bank situation. First contract arbitration is a significant departure from the design

²⁴⁴ The bargaining demand to increase the base rate from \$600 per month to \$1,140 per month was just one example. The model contract between SORWUC and the Electrical Trades Credit Union which the union used as an organizing tool contains a union shop clause, a "personal rights" clause, a "hot cargo" clause, strong and novel job security clauses, and provision for time off with pay for union meetings, among other things. The fact that these clauses appear in a collective agreement is proof that they are not unattainable, but it was unrealistic to suggest that there was a chance of negotiating them in a first contract with "Big Five" banks.

²⁴⁵ *Canada Labour Code*, S.C. 1972, c. 18, s. 171.1 as am. by S.C. 1977-78, c. 27, s. 62. The remedy is available only if the Minister in his discretion refers the matter to the Board, and the Board in its discretion considers it advisable to award a contract. In settling the contract the Board is, under s. 171.1(3) in its discretion, to take into account:

(a) the extent to which the parties have, or have not, bargained in good faith in an attempt to enter into the first collective agreement between them;

of Canadian labour relations legislation. It is a legislative recognition of the fact that the "freedom of contract" theory does not do universal justice in labour relations. There are some situations in which the free flow of economic forces will result in no contract at all, or in a contract so unbalanced as to bring the system of collective bargaining into disrepute. In such cases, the state will intervene to impose a contract.

As currently interpreted by the Canada Labour Relations Board,²⁴⁶ however, following the trail blazed by the British Columbia Labour Relations Board,²⁴⁷ first contract arbitration will have little impact on the bargaining problems in the banking industry. The CLRB has emphasized that first contract arbitration, as a departure from the entire scheme of the Code, is to be employed only in the truly exceptional case.²⁴⁸ While the bargaining situation in the banks is exceptional in the sense that it differs significantly from most industrial situations with which labour boards have hitherto been faced, its problems are not confined to isolated units; they are endemic to the industry as a whole. The CLRB decision certainly does not indicate that it is prepared to award first contract arbitration so widely.

Other elements in the CLRB interpretation of the first contract arbitration provisions of the Code also suggests its lack of utility for the banking sector. First of all, the Board has made it clear that the remedy will not be available where there is simply hard bargaining, or where the parties have entrenched themselves in divergent positions and refuse to budge.²⁴⁹ These situations must continue to be resolved by economic warfare. Second, the Board has also made it clear that parties cannot look to first contract arbitration for breakthroughs in collective bargaining.²⁵⁰ Thus SORWUC, even if it had met the threshold requirements, would not have won the novel contract clauses in which it was most interested.²⁵¹

The SORWUC bargaining situation was never aired before the Board, and it is perhaps barren to speculate on whether the facts would have attracted Board intervention. It seems unlikely, particularly since the union had not tried conventional economic weapons and, therefore, was not in a position to demonstrate that the situation was so pathological that it could only be cured by resorting to extraordinary measures. Furthermore, the banks were clearly prepared to sign some sort of contract, albeit on terms very favourable

(b) the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing the same or similar functions in the same or similar circumstances as the employees in the bargaining unit; and

(c) such other matters as the Board considers will assist it in arriving at terms and conditions that are fair and reasonable in the circumstances.

The Canadian Bankers' Association vigorously opposed first contract arbitration in a presentation before the Standing Committee considering the amending legislation.

²⁴⁶ *CJMS Radio Montreal Ltée* (1979), 27 di 796, [1979] 1 Can. L.R.B.R. 332.

²⁴⁷ *London Drugs Ltd.*, [1974] 1 Can. L.R.B.R. 140.

²⁴⁸ *CJMS Radio Montreal Ltée*, *supra* note 246, at 843 (di), 372 (Can. L.R.B.R.).

²⁴⁹ *Id.* at 834-35 (di), 365-66 (Can. L.R.B.R.).

²⁵⁰ *Id.*

²⁵¹ *Id.*

to themselves if their subsequent accommodation with other unions is any indication. In an application before the Board for first contract arbitration, SORWUC might well have found itself cast as the villain.

First contract arbitration, at least as is currently administered, is not the answer to inequalities of bargaining power embedded in the structure of an entire economic sector. No labour board would award a contract spectacular enough to serve as a really effective organizing tool. Furthermore, first contracts are not enough. With minimal organizing proceeding at a snail's pace, units that signed first contracts are in no better position to make significant gains in the second round than they were in the first. The problem is a deep-seated and long-term one. It cannot be solved by a procedure grounded on the assumption that the system is basically viable and calls for state intervention only rarely in exceptional situations.

The problem posed by the banking industry goes right to the root of the industrial relations system, in which the promotion of collective bargaining is an important, perhaps transcendent value. There are other values worth protecting, however, if collective bargaining is to fulfil its destined role as "an instrument for the advancement of fundamental freedoms in our industrial society. . . ."²⁵² These values include the right of employees freely to choose whether, and how, they wish to act collectively, and the right of employees to participate in a meaningful way in establishing their terms and conditions of employment. The strict exclusion of the employer from any role in the organizational process is a step towards protecting and nurturing the value of employees' free choice, but there is a danger that excessively intimate involvement of the state in that process may ultimately threaten the will to collective action. There are those who would argue that the working class is better off under a regime of voluntarism than one of statutory recognition, because voluntarism makes unions more militant and more self-reliant.²⁵³ History does not bear out this claim, but there is a great deal more than a grain of truth to the argument that the strongest, most effective unions are those that were built through a sharp collective struggle. It may be that unionism built through active state involvement will be merely another form of company unionism—a weak, second-rate unionism that will fail to perform its destined function.

Furthermore, the involvement of a labour board in assessing and balancing bargaining positions and awarding remedies such as first contract arbitration is certainly a threat to free collective bargaining as a means of worker participation in establishing the terms and conditions of employment. Such involvement is often opposed strenuously by both trade unions and employers because of its potential to replace unilateral employer action with unilateral state action to the exclusion of worker participation.

These risks may, however, be worth taking. It is clear that the present system is not functioning either for bank workers or for workers in other

²⁵² *Woods Report*, *supra* note 208, at 138.

²⁵³ See, e.g., Hart, "Union Recognition in America—The Legislative Snare" (1978), 7 *Indus. L.J.* 201.

hard-core unorganized sectors. The lesson of this study is that, while some helpful adjustments can be made on the periphery, the system is not likely to work much better in the future without a whole new approach requiring much more aggressive state involvement in the organizational process. A policy choice has to be made: we must decide whether the possibility that a new direction will undermine some of the values enshrined in the present system is so frightening that we are prepared to abandon sectors like banking to the not-so tender mercies of unilateral employer action in order to preserve the *status quo*. A nation that is committed to the principle that in this last quarter of the twentieth century unilateral employer action is an unacceptable method of establishing terms and conditions of employment has a clear choice.